(1)

No. 06-1791

IN THE

Supreme Court of the United States

ELIZABETH CARLISLE,

Petitioner,

v.

CARNIVAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cruise line which provides an onboard physician for its passengers as part of the cruise experience is vicariously liable for the medical negligence of that physician committed on the ship's passengers during the cruise?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
TABLE OF APPENDICES	viii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE PETITION	4
I. GENERAL MARITIME LAW IS DIVIDED ON THE ISSUE OF WHETHER A CRUISE LINE CAN BE HELD VICARIOUSLY LIABLE FOR THE MEDICAL NEGLIGENCE OF A SHIPBOARD DOCTOR ON PASSENGERS.	5
A. The split over the cruise lines' vicarious liability violates the well-established doctrine of maritime uniformity.	5

Contents

Page

B. This Court is the only judicial body capable of resolving the split of authority on this issue. 7

II. THE *BARBETTA* RULE IS ANTIQUATED AND NO LONGER REFLECTS THE MODERN DAY REALITIES OF CRUISE LINE TRAVEL. 8

III. THIS CASE RAISES A SIGNIFICANT ISSUE OF FEDERAL MARITIME LAW THAT EFFECTS CRUISE LINE PASSENGERS NATIONWIDE. 15

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Amdur v. Zim Israel Navigation Co.,
310 F. Supp. 1033 (S.D.N.Y. 1969) 6

Barbetta v. S/S/ Bermuda Star,
848 F.2d 1364 (5th Cir. 1988) ..... *passim*

Branch v. Compagnie Generale Transatlantique,
11 F. Supp. 832 (S.D.N.Y. 1935) 10

Braxton v. United States,
500 U.S. 344 (1991) 7

Byrd v. Byrd,
657 F.2d 615 (4th Cir. 1981) 5

Churchill v. United Fruit Co.,
294 F. 400 (D. Mass. 1923) 10

Coastal Fuels Marketing, Inc.
v. Florida Exp. Shipping Co., Inc.,
207 F.3d 1247 (11th Cir. 2000) 7

Costa Crociere v. Family Hotel Serv., Inc.,
939 F. Supp. 1538 (S.D. Fla. 1996) 11

DeZon v. Am. President Lines, Ltd.,
318 U.S. 660, 87 L. Ed. 1965,
63 S. Ct. 814 (1943) 14

Cited Authorities

Page

Di Bonaventure v. Home Lines, Inc.,
536 F. Supp. 100 (E.D. Pa. 1982) 6

Doonan v. Carnival Corp.,
404 F. Supp. 2d 1367 (S.D. Fla. 2005) 6

Elmlund v. Mottershead,
750 So. 2d 736 (Fla. Dist. Ct. App. 2000) 15

Fairley v. Royal Cruises Line, Ltd.,
1993 A.M.C. 1633 (S.D. Fla. 1993) 6, 11, 13, 14

Foremost Ins. Co. v. Richardson,
457 U.S. 668 (1982) 5

Huntley v. Carnival Corp.,
307 F. Supp. 2d 1372 (S.D. Fla. 2004) 6, 11, 13

La Esperanza de P.R., Inc.
v. Perez y Cia de Puerto Rico, Inc.,
124 F.3d 10 (1st Cir. 1997) 7

Laubheim v. Maatschappy,
107 N.Y. 228, 13 N.E. 781 (1887) 10

Mack v. Royal Caribbean Cruises, Ltd.,
838 N.E.2d 80 (Ill. App. Ct. 2005),
cert. denied, 127 S. Ct. 350, 166 L. Ed. 2d 44,
75 USLW 3155 (2006) 6, 7

Cited Authorities

Page

Moragne v. States Marine Lines, Inc.,
389 U.S. 375, 90 S. Ct. 1772,
26 L. Ed. 2d 339 (1970) 8, 9

Nietes v. Am.President Lines, Ltd.,
188 F. Supp. 219 (N.D. Cal. 1959) ..... *passim*

O'Brien v. Cunard Steamship Co.,
154 Mass. 272, 28 N.E. 266 (1891) 10

Patrickson v. Dole Food Co.,
251 F.3d 795 (9th Cir. 2001) 8

Sea-Land Services, Inc. v. Gaudet,
414 U.S. 573, 94 S. Ct. 806,
39 L. Ed. 2d 9 (1974) 9

The Great Northern,
251 F. 826 (9th Cir. 1918) 10

The Harrisburg,
119 U.S. 199 (1886) 8

The Korea Maru,
254 F. 397 (9th Cir. 1918) 10

The Napolitan Prince,
134 F. 159 (E.D.N.Y. 1904) 10

Cited Authorities

Page

United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975) 9, 10

Woessner v. Johns-Manville Sales, Corp., 757 F.2d 634 (5th Cir. 1985) 5

United States Constitution:

Article III, § 2 1

Article VI, § 2 1

Federal Statutes:

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1333 1

Secondary Authorities:

Bob Dickinson and Andy Vladimir, Selling the Sea: An Inside Look at The Cruise Industry, John Wiley & Sons. Inc. 10-11, 14, 15

Ross A. Klein, Cruise Ship Blues: The Underside of the Cruise Industry, New Society Publishers, (2002) at 2 ..... 11, 12

Michael J. Compagno, Malpractice on the Love Boat: *Barbetta v S/S Bermuda Star*, 14 Tul. Mar. L.J. 14

Norris, The Law of Maritime Personal Injuries 4th ed. § 3:10 (1990) 12

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Florida Dated February 15, 2007 ..... 1a

Appendix B — Opinion Of The District Court Of Appeal Of Florida, Third District Filed August 27, 2003 ..... 20a

Appendix C — Summary Final Judgment Of The Circuit Court Of The Eleventh Judicial Circuit In And For Miami-Dade County, Florida Filed February 5, 2003 ..... 37a

Appendix D — Order Of The Supreme Court Of Florida Denying Petition For Rehearing Dated March 27, 2007 ..... 38a

OPINIONS BELOW

The opinion of the trial court is unreported. The opinion of the intermediate appellate court (App., *infra*, 20a-36a), is reported at 864 So. 2d 1 (Fla. Dist. Ct. App. 2003). The opinion of the Florida Supreme Court (App., *infra*, 1a-19a), is reported at 953 So. 2d 461 (Fla. 2007).

JURISDICTION

The judgment of the Florida Supreme Court was entered on February 15, 2007. A timely motion for rehearing was denied on March 27, 2007 (App., *infra*, 38a). The jurisdiction of this Court is invoked under Article III, § 2 and Article VI, § 2 of the United States Constitution and 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, article III, § 2, and article VI § 2; 28 U.S.C. § 1333.

STATEMENT OF THE CASE

Introduction. This case presents the question of whether a cruise line should be held vicariously liable for the medical negligence of a ship's physician committed on passengers during a cruise. Until recently, most courts followed the majority rule, adopted before the birth of the modern day cruise industry, that cruise lines are not vicariously liable for the medical negligence of a ship's physician on passengers. In the past several years, however, courts and legal scholars have rejected this position and elected instead to follow the rule enunciated in *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959),

which holds that a cruise line is vicariously liable for the medical negligence of a ship's physician on passengers.[1] Because this issue involves a question of federal maritime law over which courts are presently divided, this Court is the only judicial body capable of resolving the conflict.

Facts. In March, 1997, 14-year-old Elizabeth Carlisle took a cruise onboard the M/S Ecstasy with her parents, Kristopher and Darce. (App. 2a). Prior to the vessel departing the Port of Miami, Elizabeth complained to her parents that she was experiencing abodminal pain, lower back pain, and diarrhea. (App. 2a). Elizabeth was seen several times in the ship's hospital by the ship's physician, Dr. Mauro Neri. (App. 2a). Over the course of several days Dr. Neri repeatedly advised the Carlisles that Elizabeth was suffering from the flu, assured them in response to their questions that she was not suffering from appendicitis, and provided her with antibiotics. (App. 2a). Eventually, the Carlisles left the ship with Elizabeth, who was taken to a land-based emergency room and diagnosed with a ruptured appendix. (App. 2a). As a result of the rupture and a subsequent infection, Elizabeth was rendered sterile. (App. 2a).

Elizabeth's parents sued Carnival for their daughter's injuries. (App. 2a). The complaint alleged that Carnival was vicariously liable for the doctor's failure to properly diagnose Elizabeth's appendicitis because he was Carnival's agent. (App. 2a).[2] Carnival moved for summary judgment, arguing that

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1. Still other courts have adopted a third approach to the issue, holding that cruise lines are not vicariously liable for the medical negligence of a ship's doctor, but may nevertheless be liable for the doctor's negligence under a theory of apparent agency.

2. The complaint also alleged liability under a separate theory of apparent agency. Although that issue was raised below, neither the district court of appeal nor the Florida Supreme Court addressed it.

it was not vicariously liable for Dr. Neri's negligence because he was not their agent. (App. 2a). The trial court granted the motion for summary judgment based on the Fifth Circuit's decision in *Barbetta v. S/S/ Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), which held that a cruise line is not vicariously liable for the medical malpractice of its shipboard physician as a matter of law.

The Florida Third District Court of Appeal rejected Carnival's position that the ship's doctor was not an agent of the cruise line for purposes of respondeat superior and reversed the trial court's decision. (App. 20a-36a). Citing to *Nietes*, as well as general principles of agency which are part of maritime law, the Court noted that the ship's doctor was "a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon . . ." (App. 25a). It also rejected the notion that Carnival was incapable of controlling the actions of the ship's doctor "given the with modern means of communication that exist in today's highly organized, industrial society." (App. 26a).

In addition, the Court found that *Barbetta* was premised on the "unrealistic suggestion that an ailing cruise passenger at sea has some meaningful opportunity to simply forego treatment by the ship's doctor and demand that the captain fulfill his duty of care in some other fashion." (App. 28a). The Court noted that while the presence of an onboard physician was not required by law, "the practical realities of the competitive cruise industry, and the reasonably anticipated risks of taking a small city of people to sea for days at a time, all but dictate a doctor's presence." (App. 30a).

Carnival moved for rehearing, rehearing en banc, and certification. The district court denied the motion for rehearing, but certified the question of whether a cruise line is vicariously liable for the medical malpractice of its shipboard doctor committed on a ship's passenger as one of great public importance. (App. 1a).

The Florida Supreme Court answered the certified question in the negative. The Court stated that it found "merit in the plaintiff's argument and the reasoning of the district court" because "much has changed in the world in the one hundred years since the earlier courts held ship owners immune from such claims." (App. 17a, 18a). It also acknowledged that since the appellate court's decision other courts had chosen to follow the *Nietes* rule. (App. 17a). However, because *Nietes* was the only case that recognized vicarious liability at the time the appellate court issued its decision, the Florida Supreme Court held that it was obligated to follow *Barbetta*. (App. 18a).

REASONS FOR GRANTING THE PETITION

The Florida Supreme Court's decision raises an issue of federal maritime law over which federal and state courts applying general maritime law are squarely divided. Although a majority of courts have elected to follow the *Barbetta* rule, a growing number of courts have correctly refused to follow *Barbetta* because it is outmoded and does not reflect the realities of modern day cruise line travel.

The conflict is of significance for two reasons: first, because it is at odds with the longstanding principle of maritime uniformity, and second, because the split of authority has created uncertainty among both the cruise line

industry and the millions of passengers – many of whom are United States citizens – that take cruises each year. In addition, the conflict illustrates the widening gap between the way courts feel compelled to rule on this issue and the way they believe they ought to rule. Courts have increasingly voiced their disapproval of the faulty reasoning on which *Barbetta* and its progeny are based. In fact, the Florida Supreme Court expressly stated that it agreed with the reasoning of *Nietes*, but felt bound by the law that existed at the time the appellate court ruled to follow *Barbetta*. Until this Court steps in and overrules *Barbetta*, other courts are likely to act in the same manner, even if, like the Florida Supreme Court, they disagree with the result.

I. GENERAL MARITIME LAW IS DIVIDED ON THE ISSUE OF WHETHER A CRUISE LINE CAN BE HELD VICARIOUSLY LIABLE FOR THE MEDICAL NEGLIGENCE OF A SHIPBOARD DOCTOR ON PASSENGERS.

A. The split over the cruise lines' vicarious liability violates the well-established doctrine of maritime uniformity.

Uniformity and simplicity are basic tenets of federal admiralty law. *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981); *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 648 (5th Cir. 1985)(*citing Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982))(the overriding concern of the maritime law is the federal interest in the need for a uniform development of the law governing the maritime industries). The doctrine of uniformity was created so that passengers and shipowners could know with certainty what rules applied to the vessel and what liabilities could arise, regardless of where the ship happened to be.

Presently, there are four different views on the issue of whether a cruise line is liable for the medical negligence of a ship's doctor on passengers. The majority of courts have held that a cruise line cannot be held vicariously liable as a matter of law for the medical negligence of the ship's doctor on passengers. *See, e.g., Barbetta*; *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033 (S.D.N.Y. 1969); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100 (E.D. Pa. 1982). A growing number of courts, however, have rejected the *Barbetta* rule and held that a cruise line is vicariously liable for the medical negligence of a ship's doctor. *See, e.g., Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372 (S.D. Fla. 2004); *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005), *cert. denied*, 127 S. Ct. 350, 166 L. Ed. 2d 44, 75 USLW 3155 (2006) (finding that federal maritime law is unsettled on the issue of a cruise line's vicarious liability for the negligence of a ship's doctor on passengers and affirming the denial of the ship owner's motion to dismiss in accord with the holdings of *Nietes*, *Huntley* and *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993). Among those courts that have upheld *Barbetta*, a number have expressed reservations about the reasoning behind it, but have declined to overrule it as a matter of *stare decisis*. *See, e.g., Carnival Corp. v. Carlisle*, 953 So. 2d 461 (Fla. 2007); *Fairley*, 1993 A.M.C. at 1633. Still another group of courts has declined to overrule *Barbetta*, but has held that a cruise line can be liable for the negligence of its ship's physician on passengers based on other legal theories, such as apparent agency. *See Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371-72 & n.2 (S.D. Fla. 2005); *Fairley*, 1993 A.M.C. at 1633.[3]

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3. Although The Florida Supreme Court found merit in Carlisle's position, it nevertheless felt compelled to reverse the appellate court's decision because it considered the law regarding

(Cont'd)

Because of the lack of consensus among courts on this issue, it is currently impossible for passengers to know with any degree of certainty whether, before embarking on a cruise, they will be able to recover damages if their doctor commits an act of medical negligence.[4] Similarly, as Carnival pointed out in its filings in the courts below, it is impossible under the current state of the law for cruise lines to know definitively what their obligations are to passengers in this area.

B. This Court is the only judicial body capable of resolving the split of authority on this issue.

This Court is the only judicial body capable of resolving the split of authority on this issue. One of the primary purposes of this Court's certiorari jurisdiction is to resolve conflicts among courts concerning the provisions of federal law. *Braxton v. United States*, 500 U.S. 344 (1991).[5] In the case of general

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(Cont'd)

vicarious liability to be settled *at the time the appellate court reached its decision*. (App. 18a-19a). Regardless of whether the Florida Supreme Court was correct in so concluding – which we believe it was not– there is no question that the law was clearly not settled at the time it issued its decision, a fact the court itself concedes. (App. 17a); *Mack*, 838 N.E.2d at 91.

4. Although passengers theoretically have a right to sue the ship's doctor personally, since most cruise line doctors are non-U.S. citizens who have no connection with the United States, obtaining service and jurisdiction over them is virtually impossible. (App. 35a).

5. General maritime law is federal law. *Coastal Fuels Marketing, Inc. v. Florida Exp. Shipping Co., Inc.*, 207 F.3d 1247 (11th Cir. 2000); *La Esperanza de P.R., Inc. v. Perez y Cia de Puerto Rico, Inc.*, 124 F.3d 10 (1st Cir. 1997)(maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules).

maritime law, the Supreme Court is the final arbiter, regardless of whether the question arises in federal or state court. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001)("Ultimately, the Supreme Court has the final say on any question of federal law, whether it arises in federal or state court . . .").

Unless this Court puts an end to this controversy, courts will continue to come up with inconsistent decisions on a question of federal maritime law effecting potentially every cruise line passenger in the country, or mistakenly conclude, as the Florida Supreme Court did here, that they lack authority to reject *Barbetta*.

II. THE *BARBETTA* RULE IS ANTIQUATED AND NO LONGER REFLECTS THE MODERN DAY REALITIES OF CRUISE LINE TRAVEL.

Furthermore, this Court should overrule *Barbetta* because it is based on flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers.

Although this Court cannot summarily disregard existing law, it has not hesitated on prior occasions to overrule longstanding maritime precedents that have outlived their usefulness. In *Moragne v. States Marine Lines, Inc.*, 389 U.S. 375, 90 S. Ct. 1772, 26 L. Ed. 2d 339 (1970), this Court recognized a claim for wrongful death under general maritime law, overruling more than 80 years of precedent in the process. In explaining its decision to depart from the well-settled rule of law established in *The Harrisburg*, 119 U.S. 199 (1886), which held that there was no claim for wrongful death under general maritime law, the Court noted that *The Harrisburg* had been criticized as "barbarous" for its unjust result, and was based

"on a particular set of factors that had, when [it] was decided, *long since been thrown into discard even in England*, and that had never existed in this country at all."

> The most likely reason that the English rule was adopted in this country without much question is simply that it had the blessing of age. That was the thrust of this Court's opinion in *Brame*, as well as many of the lower court opinions. Such nearly automatic adoption seems at odds with the general principle, widely accepted during the early years of our Nation, that while 'our ancestors brought with them [the] general principles [of the common law] and claimed it as their birthright; ... they brought with them and adopted only that portion which was applicable to their situation."

389 U.S. at 381, 386, 90 S. Ct. 1778, 1781, 26 L. Ed. 2d at 345, 348 (emphasis added); *accord, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 576 94 S. Ct. 806, 810 39 L. Ed. 2d 9, 16 (1974)(noting that "*Moragne* reflected dissatisfaction with this state of the law that illogically and unjustifiably deprived the dependents of many maritime death victims of an adequate remedy for their losses").

Five years later, this Court reversed another longstanding precedent in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975), when it eliminated the doctrine of divided damages from admiralty law. As in *Moragne*, the Court in *Reliable Transfer* found the doctrine of divided damages to be "shrouded in the mists of history" and in need of re-examination. 421 U.S. at 402, 95 S. Ct. at 1711, 44 L. Ed. 2d at 257. And, as in *Moragne* and in this case, the Court took issue with the "validity of

[the rule's] underpinnings" and "the propriety of its present application." 421 U.S. at 402 n.4, 95 S. Ct. at 1711 n.4, 44 L. Ed. 2d at 257 n.4.

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. *The reasons that originally led to the Court's adoption of the rule have long since disappeared.* The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in The Schooner Catharine - the "just and equitable" allocation of damages.

421 U.S. at 402 n.4, 411, 95 S. Ct. at 1711 n.4, 1715, 44 L. Ed. 2d at 257 n.4, 261 (emphasis added).

Like the cases on which these outmoded maritime doctrines were based, the majority of cases on which *Barbetta* rests were decided long before the advent of modern day passenger cruising. *See The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826 (9th Cir. 1918); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F. 400 (D. Mass. 1923); *The Napolitan Prince*, 134 F. 159 (E.D.N.Y. 1904); *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. Maatschappy*, 107 N.Y. 228, 13 N.E. 781 (1887). A few date back more than a century, long before cruise lines became "floating hotels" offering a wide range of services to passengers, including twenty four hour medical care. *See* Bob Dickinson and Andy Vladimir, *Selling the Sea: An Inside*

Look at the Cruise Industry, John Wiley & Sons, Inc., at 210; *Costa Crociere v. Family Hotel Serv., Inc.*, 939 F. Supp. 1538, 1557 (S.D. Fla. 1996) (noting that "drastic changes have occurred in the maritime industry" since the adoption of seamen as wards of admiralty").[6]

And like the cases on which these doctrines were founded, the *Barbetta* line of cases rests on the shakiest of legal "fictions." (App. 28a); *Nietes*, 181 F. Supp. at 220. Chief among them is the *Barbetta* court's finding that passengers are free to contract with the ship's doctor for any medical services they may require. While a passenger is *technically* free to decline onboard medical treatment, if he is at sea and in medical distress, he *realistically* does not have any "meaningful" alternative other than to seek medical care onboard the vessel. *See Carlisle*, 864 So. 2d at 4; *see also Huntley*, 307 F. Supp. 2d at 1372 ("a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor"); *Fairley*, at 1993 AMC at 1639 ("if a passenger is ill, and port is distant, the ship's doctor is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies.")

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6. Between 1970-1995, passenger cruises became the fastest-growing segment of the entire travel and tourism industry in the United States–outpacing hotels, restaurants and theme parks. Dickinson and Vladimir, *Selling the Sea: An Inside Look At the Cruise Industry*, at 37; Ross A. Klein, *Cruise Ship Blues: The Underside of the Cruise Industry*, New Society Publishers, (2002) at 2. In addition, the composition of cruise line passengers has also changed. Passengers are no longer "older empty-nesters, with relatively simple tastes," but "everyman." Dickinson and Vladimir, *Selling the Sea: An Inside Look At the Cruise Industry*, at 62. Consequently, "the ship's product delivery . . . of necessity is more diverse and complex." *Id.*

Indeed, the notion that ill passengers such as Carlisle are free to accept or decline shipboard medical services is as disingenuous as the claim that ship's doctors are "independent contractors" rather than agents of the cruise line. Ship's doctors are no different from any other ship's officers. They are subject to ship's discipline under general maritime law, as well as the lawful commands of the captain. *See Norris, The Law of Maritime Personal Injuries* 4th ed. § 3:10 (1990). When they are sick or injured, they are entitled to all of the remedies available to other crewmembers under the Jones Act and maritime law, including maintenance and cure and the warranty of seaworthiness. *Id.*

Moreover, cruise lines do exercise an element of control over the doctor-patient relationship, such as the selection of medical personnel, the hours of operation of the infirmary, and the procedures for the operation of the ship's hospital. *Carlisle*, 864 So. 2d at 5. Furthermore, with the advent of modern technology, cruise line shoreside medical personnel have the ability to monitor and communicate with the ship's physician while he is on board the vessel in a way that they did not back when the "*Barbetta* rule" was first decided. *Nietes*, 188 F. Supp. at 220; *see also Klein* at 78 (noting that advent of "telemedical" satellite hook-ups from ship to shore onboard cruise ships). The notion that ship's physicians are wholly "independent" from the cruise line by simply labeling them independent contractors on fine print in a passenger ticket is pure fiction.

Barbetta also rests on the false assumption that the ship's physician is provided for the convenience of the ship's passengers, rather than as an economical alternative to fulfilling its duty of reasonable care to its passengers. Under maritime law, a cruise line has a duty to provide reasonable

medical care to passengers under the circumstances. *See Fairley*, 1993 AMC at 1639. While fulfillment of this duty does not legally require cruise lines to provide an infirmary or shipboard medical staff to passengers, *realistically* they have no other alternative unless they wish to divert their vessels every time a passenger becomes ill and requires medical treatment — something no modern day cruise line could possibly do if it wished to stay in business. *See* (App. 30a) ("The fallacy of the notion that the acutely ill passenger at sea has sifted through a series of options and ultimately chosen to use the ship's doctor underscores the fiction of the familiar incantation that the physician is on board merely for the "convenience of the passenger."); *accord Huntley*, 307 F. Supp. 2d at 1372 ("[w]here the cruise line has made an economic decision — that it is the most cost-effective for the cruise line and most attractive to prospective passengers for it to employ a shipboard doctor with a well-equipped shipboard infirmary in order to discharge its duty to provide reasonable medical attention under the circumstances — it is not unreasonable to require the cruise line to bear the costs of such decision"), *Fairley*, 1993 AMC at 1639. Indeed, because the employment of a doctor aboard a ship is a beneficial substitute for the shipowner's otherwise more costly duty to sick passengers, there is a legitimate reason to impose liability on a cruise line for the negligence of its doctors. *See* (App. 30a); *Fairley*, 1997 AMC at 1639 ("where the cruise line has reaped the benefits of carrying a doctor aboard its vessels, there may be circumstances where it should be required to bear its consequences.")

In addition, cruise lines also benefit from providing passengers with a shipboard physician, "since the presence of a qualified physician on board, with a well-equipped and well-staffed infirmary, is an enticement to purchase the

ticket." *Fairley*, at 1993 AMC 1639; *Carlisle*, 864 So. 2d 1. And while cruise lines are not *technically* required to provide quality medical care to passengers, in today's competitive cruise line industry, they need to do so if they wish to remain in business. *Carlisle*, 864 So. 2d at 5; *see also* Dickinson and Andy Vladimir, *Selling the Sea: An Inside Look at the Cruise Industry*, at 78 ("Legally there are no American or international requirements concerning the level of cruise-ship medicine. However, *since lines are in the hospitality business, it makes eminent sense to provide necessary and adequate medical care.*")(emphasis added). To the extent that cruise lines benefit economically from providing medical services to passengers, there is no reason why they should not be required to assume responsibility for their human costs of those services. *See Fairley*, 1993 AMC at 1639.

Furthermore, allowing the Florida Supreme Court decision to stand would have the anomalous effect of shielding cruise lines from liability for the malpractice of shipboard physicians committed on passengers, while continuing to hold them vicariously liable for negligence committed on crewmembers. *See Michael Compagno, Malpractice on the Love Boat: Barbetta v S/S Bermuda Star*, 14 Tul. Mar. L.J. at 390-391. This result seems particularly absurd where, as here, the vessel owner agrees to indemnify the doctor for all malpractice claims, regardless of who brings them. *See DeZon v. Am. President Lines, Ltd.*, 318 U.S. 660, 87 L. Ed. 1065, 63 S. Ct. 814 (1943). There is simply no logical justification for allowing a crewmember to recover damages from a shipowner for the malpractice of its physician while leaving a passenger injured *by that same physician* without any legal recourse. *Id.*

The biggest problem with *Barbetta*, however, is that in many cases, such as this one, it leaves an injured plaintiff without any viable legal remedy. Although passengers such as Carlisle *theoretically* have an action against cruise line doctors who commit medical malpractice, *realistically* that action is only as good as their ability to serve those physicians with process and exercise jurisdiction over them. Many ship's doctors live abroad and have no connection to the United States or the forum where plaintiffs are required to sue. *See* Dickinson and Vladimir, *Sailing the Sea: An Inside Look at the Cruise Industry* at 78. As a result, it is often a practical impossibility to serve them with process within the time required by the Rules of Civil Procedure or obtain personal jurisdiction over them. (App. 35a n.4); *Elmlund v. Mottershead*, 750 So. 2d 736 (Fla. Dist. Ct. App. 2000).

Whatever logical basis the *Barbetta* rule may at one time have had, there is no question that like the last clear chance rule and the doctrine of divided damages, it has outlived its usefulness.

III. THIS CASE RAISES A SIGNIFICANT ISSUE OF FEDERAL MARITIME LAW THAT EFFECTS CRUISE LINE PASSENGERS NATIONWIDE.

Finally, this Court should grant the petition in this case because the issue of whether a cruise line is vicariously liable for the medical negligence of a ship's physician on passengers has widespread ramifications for passengers considering cruise line travel. Although the cruise lines claim that they overtly disclose to passengers that shipboard doctors are "independent contractors" in their passenger tickets — disclosures which typically are sandwiched among pages of fine print in a multi-page agreement — most passengers

onboard cruise ships assume that the term "ship's doctor" means what it says. Many of those passengers are elderly or have special medical needs. If the Florida Supreme Court's decision and the *Barbetta* line of cases are allowed to stand, those passengers will be left without a viable legal remedy, solely because the lower courts are bound by precedent to adhere to an antiquated rule that most modern judges agree makes no practical sense.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF FLORIDA DATED FEBRUARY 15, 2007

SUPREME COURT OF FLORIDA

No. SC04-393

CARNIVAL CORPORATION,

Petitioner,

vs.

DARCE CARLISLE,

Respondent.

[February 15, 2007]

QUINCE, J.

We have for review a decision of a district court of appeal on the following question, which the court certified to be of great public importance:

> WHETHER A CRUISE LINE IS VICARIOUSLY LIABLE FOR THE MEDICAL MALPRACTICE OF THE SHIPBOARD DOCTOR, COMMITTED ON A SHIP'S PASSENGER?

Carlisle v. Carnival Corp., 864 So.2d 1, 8 (Fla. 3d DCA 2003). We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we answer the certified question in the negative.

Appendix A

Factual and Procedural History

The material facts, taken from the Third District's decision, are as follows:

> In March 1997, the Carlisle family embarked on a cruise aboard the Carnival cruise ship, the Ecstasy. During the cruise, 14 year old Elizabeth Carlisle felt ill with abdominal pain, lower back pain and diarrhea and was seen several times in the ship's hospital by the ship's physician, Dr. Mauro Neri. Over the course of several days Dr. Neri repeatedly advised the Carlisles that Elizabeth was suffering from the flu, assured them in response to their questions that it was not appendicitis, and provided antibiotics. Ultimately, the Carlisle family decided to discontinue their cruise and returned home to Michigan where Elizabeth was diagnosed as having a ruptured appendix. Her appendix was removed, and as a result of the rupture and subsequent infection, Elizabeth was rendered sterile.
>
> Her parents filed the instant suit against Carnival and Dr. Neri, alleging, *inter alia*, that the doctor had acted negligently in his treatment of Elizabeth and that Carnival should be held vicariously liable for such negligence under theories of agency and apparent agency, and that Carnival was negligent in the hiring of Dr. Neri. The trial court entered summary judgment in favor of Carnival and this appeal followed.

Id. at 2. Third District found that the issue had never been addressed by this Court and concluded that, of the conflicting precedents on the issue, *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D.Cal.1959), provided the better-reasoned rationale for resolving the issue of a cruise liner's liability for the medical negligence of its shipboard doctor.

The district court found that because the record indicated control by Carnival over the doctor's medical services, the question of agency had not been refuted. The court held, "[R]egardless of the contractual status ascribed to the doctor, for purposes of fulfilling the cruise line's duty to exercise reasonable care, the ship's doctor is an agent of the cruise line whose negligence should be imputed to the cruise line." *Id.* at 7. The court reversed the summary judgment in favor of Carnival, remanded the case for further proceedings consistent with its holding, and certified to this Court the above-stated question as one of great public importance.

ANALYSIS

Applicable Law Under the Concurrent Jurisdiction of Maritime Torts

The parties in this case agree that the instant action, involving the malpractice of a doctor on the high seas, falls within the purview of federal admiralty jurisdiction. *See Everett v. Carnival Cruise Lines*, 912 F.2d 1355 (11th Cir.1990); *Doe v. Celebrity Cruises*, 145 F.Supp.2d 1337 (S.D.Fla.2001). Under the "saving to suitors" clause of the Judiciary Act of 1789, currently codified as 28 U.S.C. § 1333(1) (2000), state courts have concurrent jurisdiction

with the federal courts as to *in personam* claims based on maritime torts.[1] Both federal and state courts must apply federal maritime law that directly addresses the issues at hand. *See Greenly v. Mariner Mgmt. Group, Inc.*, 192 F.3d 22, 25-26 (1st Cir.1999) (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21, 75 S.Ct. 368, 99 L.Ed. 337 (1955)).

Federal maritime law is an amalgamation of federal legislation, federal common law, and state maritime law. A court sitting in admiralty jurisdiction "may-and should-resort to state law when no federal rule covers a particular situation." *Greenly*, 192 F.3d at 26. Indeed, there is an established line of United States Supreme Court precedent recognizing that maritime law may be supplemented or modified by the states where the supplement or modification does not conflict with an essential feature of exclusive federal jurisdiction.[2] State courts are specifically empowered to

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1. Though maritime cases traditionally fell under admiralty jurisdiction in any case where the alleged tort took place upon a vessel in navigable waters, current jurisprudence requires that the tort satisfy both the "locality" prong and the "maritime connection" prong of an admiralty jurisdiction test before maritime law will apply. In determining whether the tort has a substantial connection to traditional maritime activity, the United States Supreme Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1994), held that a court must assess whether the "incident involved was of a sort with the potential to disrupt maritime commerce." *Id.* at 538, 115 S.Ct. 1043.

2. "[T]he State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and

(Cont'd)

create new remedial maritime law within those narrow constraints. In the instant case, however, there are federal decisions and established rules of law that directly address the liability of a ship owner for the alleged negligence of the ship's physician.

Controlling Precedent in Maritime Law

This Court must determine whether the Third District Court of Appeal could follow the holding in *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D.Cal.1959), or whether the Third District was bound to follow the other precedent as outlined in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir.1988). Carnival and Carlisle differ in their views as to whether the district court was required to follow the rule of maritime law stated in *Barbetta v. S/S Bermuda Star* and espoused by the majority of federal courts that have ruled upon this liability issue.

(Cont'd)

enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers*, 312 U.S. 383, 388, 61 S.Ct. 687, 85 L.Ed. 903 (1941) (reversing the Fifth Circuit Court of Appeals in a maritime tort action and affirming the application of Florida law, which provided for the survival of a cause of action against a deceased ship owner/tortfeasor because application of the state survival of actions rule was not repugnant to a characteristic feature of maritime law and was not violative of the uniformity rule). Furthermore, there is "a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction." *Id.* at 391, 61 S.Ct. 687.

Appendix A

Neither the United States Supreme Court nor this Court has directly ruled on the issue of whether a ship owner may be held vicariously liable for the alleged negligent provision of medical care to a passenger by its shipboard physician. However, a number of federal district courts and courts of appeal have ruled on this issue.[3] The question thus becomes whether the Third District was bound to follow the rule of law on this issue as espoused by the majority of such cases. In other words, the questions that must be answered are whether there is a uniform federal position on the issue and whether application of the *Nietes* rule would violate the rule of uniformity.

Generally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-221, 51 S.Ct. 453, 75 L.Ed. 983 (1931), there is no similar obligation with respect to decisions of the lower federal courts." *Abela v. Gen. Motors Corp.*, 469 Mich.

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3. *See, e.g., Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir.1990); *Barbetta*, 848 F.2d at 1367; *The Korea Maru*, 254 F. 397, 399 (9th Cir.1918); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49 (S.D.Fla.1990), *aff'd*, 932 F.2d 977 (11th Cir.1991); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F.Supp. 488, 491 (D.P.R.1992); *Hilliard v. Kloster Cruise, Ltd.*, 1991 A.M.C. 314, 316-17 (E.D.Va.1990); *Di Bonaventure v. Home Lines, Inc.*, 536 F.Supp. 100, 103-04 (E.D.Penn.1982); *Bowns v. Royal Viking Lines, Inc.*, 1977 A.M.C. 2159 (S.D.N.Y.1977); *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D.Mass.1923); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y.1904).

603, 677 N.W.2d 325, 327 (2004), *cert. denied*, 543 U.S. 870, 125 S.Ct. 98, 160 L.Ed.2d 117 (2004). Decisions of numerous state supreme courts have similarly held that state courts are under no obligation to follow the decisions of the lower federal courts. *See, e.g., Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148 P.2d 182, 185 (1944) ("[D]ecisions of lower federal courts are persuasive and usually followed unless a conflict between the decisions of such courts makes it necessary to choose between one or more announced interpretations.").

Under federal maritime law a state may, in exercising its *in personam*[4] jurisdiction in maritime cases, adopt such remedies as it sees fit so long as it does not make changes in the substantive law.[5] This rule is violated when the state remedy "works material prejudice to the characteristic features of the general maritime law or interferes with the

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4. The United States Supreme Court in *The Moses Taylor*, 4 Wall. 411, 71 U.S. 411, 431, 18 L.Ed. 397 (1866), held that an *in rem* proceeding against a vessel is purely an admiralty proceeding and is within the exclusive jurisdiction of the federal courts. *See also Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124, 44 S.Ct. 274, 68 L.Ed. 582 (1924) ("A state may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction.").

5. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (stating that "federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country' ") (quoting *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575, 22 L.Ed. 654 (1874)); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th cir.2004) ("[T]he purpose behind the exercise of this Court's admiralty jurisdiction is to provide for the uniform application of general maritime law.").

proper harmony and uniformity of that law in its international and interstate relations." *American Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086 (1917)). With regard to the need for harmony within the field of maritime law in the absence of controlling federal legislation, the United States Supreme Court specifically held that "[u]niformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just v. Chambers*, 312 U.S. 383, 392, 61 S.Ct. 687, 85 L.Ed. 903 (1941).

Harmony and Uniformity of Maritime Law

Carnival asserts that, by following *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D.Cal.1959), the Third District has crafted a dramatic change in settled federal maritime law and thus violated the long-standing principle of uniformity. More specifically, Carnival asserts that cases following *Barbetta*, with *Nietes* as the lone exception, have established a settled rule of maritime law that a ship owner may not be held vicariously liable for the negligence of a shipboard physician.

In *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir.1988), the Fifth Circuit Court of Appeals addressed the issue of whether a ship owner could be held liable to a passenger under a theory of *respondeat superior* for the medical negligence of the ship's doctor. The ship owners asserted that, because the doctor was not their servant or agent, they could not be held vicariously liable for his negligent actions under general maritime law. The ship

owners also proffered a provision of the ticket contract that disclaimed all liability for the negligence of the physician. The trial court noted that the general maritime law offered no completely consistent answer regarding the vicarious liability of a ship owner to a passenger for alleged negligent medical treatment by the ship's doctor, but it determined that it was unnecessary to decide the case on that theory. *Id.* at 1367. The trial court reasoned that, regardless of the possible existence of a master-servant relationship, the contractual limitation of liability on the ticket was not against public policy and therefore liability could not be premised upon a theory of *respondeat superior. Id.*

On appeal, the Fifth Circuit concluded that it must first determine whether maritime law permits vicarious claims. The court noted that the case raised the following question of law, "Assuming the doctor was negligent in performing his duties, would the doctrine of respondeat superior impose liability on the defendants?" *Id.* at 1368.[6] The court concluded that the doctrine does not impose liability upon a ship owner and recited the general rule:

> Although neither the Supreme Court, this court, nor any district court in this circuit has ruled on

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6. By footnote, the Fifth Circuit reluctantly acknowledged the application of 46 U.S.C. App. § 183c, which prohibits vessels transporting passengers from disclaiming liability for the negligence of its servants which causes death or bodily injury. Curiously, the court excepted the ticket's disclaimer from the statute, characterizing the ticket language as "merely an accurate restatement of the principles of general maritime law which we have reviewed above." *Id.* at 1372 n. 2.

> the question, we are not without guidance. An impressive number of courts from many jurisdictions have, for almost one hundred years, followed the same basic rule: When a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the carrier has a duty to employ a doctor who is competent and duly qualified. If the carrier breaches its duty, it is responsible for its own negligence. *If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier.*

Id. at 1369 (emphasis added). The court cited to a line of cases from 1887 to 1982, which held that the carrier was only liable for its own possible negligence in the hiring of the physician.

The *Barbetta* court stated its rationale for the rule in two often-repeated justifications. First, the carrier does not have the capacity to control the relationship between the physician and the passenger since that relationship is under the control of the passenger. *See id.* (citing *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891)). Second, "[a] shipping company is not in the business of providing medical services to passengers; it does not possess the expertise requisite to supervise a physician or surgeon carried on board a ship as a convenience to passengers." *Id.* (quoting *Amdur v. Zim Israel Navigation Co.*, 310 F.Supp. 1033, 1042 (S.D.N.Y.1969)).

The *Barbetta* court reasoned that the "justifications for the general rule are tied to the concept of control" because

"respondeat superior liability is predicated upon the control inherent in a master-servant relationship." *Id.* at 1370. In examining the potential for control by a ship owner, the *Barbetta* court remarked only that numerous earlier courts had found that the carrier or ship owner lacked the "expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients" and "the power, even if it had the knowledge, to intrude into the physician-patient relationship." *Id.* at 1371. The *Barbetta* court consequently declared, "a carrier *cannot* exercise control over the ship's doctor as he practices medicine" and therefore held that a carrier could not be held liable for the doctor's negligence under a theory of respondeat superior. *Id.* (emphasis added). However, after reciting precedent that predicates the application of vicarious liability upon the existence of control, the *Barbetta* court itself avoided any analysis of record evidence relevant to control. Instead, it flatly declared and accepted the broad rule "that general maritime law does not impose liability under the doctrine of respondeat superior upon a carrier or ship owner for the negligence of a ship's doctor who treats the ship's passengers." *Id.* at 1372.

The concept of control, however, is also the very essence of the rationale underlying the *Nietes* decision and the decision by the Third District in this case. Analyzing the issue of control, the court in *Nietes* reached a different result from the *Barbetta* court and decisions in earlier cases. In *Nietes*, the injured passenger alleged that the ship's doctor and nurses were employees of the shipping company. The *Nietes* court found this allegation sufficient to state a cause of action under a theory of vicarious liability and denied the company's motion to dismiss. In determining that the claim was legally

viable, the court acknowledged the "ancient rule" that precluded liability based upon the independent contractor status of the physician. *Nietes*, 188 F.Supp. at 220. However, the court examined specific aspects of the relationship between the physician and the ship owners to conclude that the physician was an employee. The court said:

> It is our opinion that, where a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of *respondeat superior* at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable. The same would be true, *a fortiori*, as to a ship's nurses.

Id.

The *Barbetta* court recognized that the rule actually adopted by *Nietes* "imposes liability only when the carrier has some control over the doctor." *Barbetta*, 848 F.2d at 1370. But rather than analyze the particular relationship between the parties to determine whether aspects of control could in fact exist, the *Barbetta* decision relied upon the factual conclusions of earlier maritime cases to support the general maritime rule. *See id.* at 1369-71. For example, *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266 (1891), cited by *Barbetta* and a number of maritime decisions, holds

that a ship owner's sole duty is to provide a duly qualified and competent surgeon and that the ship owner is not vicariously liable to a passenger for the negligence of the shipboard surgeon. *See id.* at 267. The passenger in *O'Brien* also alleged that the physician was a servant of the ship owner and subject to its control. The rationale for the *Barbetta* decision is found in the *O'Brien* court's decree that "[t]he master or owners of the ship *cannot* interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business, and subject to their control as to his mode of treatment." *Id.* (emphasis added). The *O'Brien* court, however, analyzed and construed the duty of the ship owner under an 1882 act of Congress that was later repealed.[7] The court further asserted, without citation to any precedent, that any duty under the common law would be no greater than that under the statute. *Id.* at 267. Citing to *Laubheim v. Netherland Steamship Co.*, 107 N.Y. 228, 13 N.E. 781 (1887), as support for its holding under the statute, the *O'Brien* court concluded that it was unreasonable to hold the ship owners liable when they were required by law to keep a physician on board but were "powerless to interfere" in the relationship between physician and patient. *Id.*

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7. The Act of Congress of August 2, 1882, 22 Stat. 186, *repealed by* Pub.L. 98-89, § 4(b), 97 Stat. 599-600 (1983), set forth the duty of late nineteenth century carriers to employ a competent and qualified physician for the benefit of the passengers. The court in *O'Brien* interpreted that duty to include both hiring a competent physician and providing the necessary instruments and medical supplies that the physician would need in order to exercise the craft of providing medical treatment. *O'Brien*, 28 N.E. at 267.

Laubheim was decided after the Act of 1882 took effect, although the tort appears to have accrued beforehand. The court found that there was no evidence of underlying negligent treatment by the physician, but it further stated that a ship owner could only be held liable where it failed to select a reasonably competent physician. *Id.* at 781. The court did not analyze what, if any, control the ship owner may have asserted over its physician, but instead cited three decisions as support for its holding. One case involved a railroad's liability for the negligence of its physician, *Secord v. St. Paul Minneapolis & Manitoba Ry. Co.*, 18 F. 221 (C.C.D.Minn.1883), one involved a railroad's liability for the negligence of a non-medical employee under the fellow-servant doctrine, *Chapman v. Erie Ry. Co.*, 55 N.Y. 579 (1874), and one involved the liability of a public charity hospital for the negligence of its physician, *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876).

In *The Great Northern*, 251 F. 826 (9th Cir.1918), the court noted that the appellant relied expressly upon the 1882 Act of Congress, but the court decided the question under both the Act and the common law. *See id.* at 830. The court cited five cases in support of its decision that the ship owner was not vicariously liable for the negligence of the on-board physician, including the two earlier decisions in *O'Brien* and *Laubheim*. The court liberally quoted the language from *O'Brien* as to the ship owner's presumptive lack of control but ultimately held that the ship owner's statutory duty was met. *Id.* at 831-32.

In *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943), the United States

Supreme Court also cited to the litany of early decisions which held that the ship owner could not be held vicariously liable for the negligence of the shop's doctor. Though *De Zon* decided only that the ship owner could be held vicariously liable under the Jones Act for harm to the seaman caused by the negligence of the ship's doctor, by footnote, the Supreme Court cited several of the passenger cases above. It noted that ship owners have not been found liable to passengers because the medical treatment was business between the doctor and the passenger rather than fulfillment of the doctor's duty to the ship. *See id.* at 666 n. 2, 63 S.Ct. 814. However, the Supreme Court found that the distinction between passenger cases and seaman cases turns upon issues of control, and stated, "in this case the physician was not in his own or the seaman's control; he was an employee and as such subject to ship discipline and the master's orders." *Id.* at 668, 63 S.Ct. 814.

The court in *Amdur v. Zim Israel Navigation Co.*, 310 F.Supp. 1033 (S.D.N.Y.1969), supplementing Israeli law with the general maritime law, also relied upon the general rule of law recited in these earlier decisions and found that "a shipping company is not in the business of providing medical services to passengers; it does not possess the expertise requisite to supervise a physician or surgeon carried on board a ship as a convenience to passengers." *Id.* at 1042. Although the court recognized the applicability of *Nietes* to some species of passengers' vicarious liability claims where it stated, "This rationale, while perhaps viable for the specific fact pattern in *Nietes*, is not sound as a general rule," it strongly criticized the *Nietes* decision. *Id.* at 1042. The *Amdur* court appropriately took issue with the concept that a

shipboard physician became subject to the control of the ship owner simply through mere employment, and it declared that neither a ship's master nor a shore-bound chief surgeon could occupy sufficient control over a shipboard doctor to warrant imputation of liability. *See id.* at 1042-43. Ultimately, however, the court held only that the facts before it failed to indicate any negligence by the physician, thus obviating the application of respondeat superior. *Id.* at 1046.

In *Di Bonaventure v. Home Lines, Inc.*, 536 F.Supp. 100 (E.D.Pa.1982), an injured passenger brought a vicarious liability claim against the ship owner, contending that the ship's physician was an employee of the ship owner. The ship owner claimed that the physician was an independent contractor. The court emphasized that the "respondeat superior theory is predicated upon the control inherent in a master-servant relationship." *Id.* at 104. Without analysis of any fact relevant to the issue of control, the court simply quoted *Amdur* for the general proposition that a ship's doctor is an independent medical expert and held that vicarious liability would not lie because such control was lacking. *Id.* at 103-04.

Despite the long line of precedent reciting that a ship owner may not be held vicariously liable for the medical negligence of its shipboard doctor, the Third District in this case followed *Nietes*, which was then the sole decision to hold that liability may be imputed to a ship owner under a theory of respondeat superior for the negligence of its shipboard doctor upon a passenger. *See Nietes*, 188 F.Supp.

at 220.[8] The position espoused by the Third District has some appeal because much has changed in the world in the one hundred years since the earlier courts held ship owners immune from such claims. As the court below observed, "While the presence of an onboard physician is not required by law, the practical realities of the competitive cruise industry, and the reasonably anticipated risks of taking a small city of people to sea for days at a time, all but dictate a doctor's presence." *Carlisle v. Carnival Corp.*, 864 So.2d 1, 6 (Fla. 3d DCA 2003). Moreover, modern means of communication make it possible for the actions of the shipboard doctor to be controlled and supervised by a doctor thousands of miles away.

We are also aware of cases that have been decided since the district court's decision that have likewise followed the *Nietes* rule. In *Huntley v. Carnival Corp.*, 307 F.Supp.2d 1372 (S.D.Fla.2004), the passenger argued that the ship owner was vicariously liable, under a theory of actual or apparent agency, for the alleged medical malpractice of the ship's physician. The federal district court analyzed the rationale underlying the Third District's opinion in *Carlisle*, as well as the opinions in *Barbetta*, *Nietes*, and *Fairley*, and concluded that the *Carlisle* decision appeared to be "thorough and well-reasoned." *Huntley*, 307 F.Supp.2d at 1374. The *Huntley* court

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8. The Southern District of Florida in *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D.Fla.1993), denied a ship owner's motion to dismiss without adopting the rule of *Nietes*. While acknowledging that the majority rule precludes a passenger from suing the ship owner on the theory of respondeat superior, the court held the plaintiff could conceivably prevail on other theories, such as agency by estoppel.

denied the ship owner's motion to dismiss the claim for vicarious liability, finding it was unable to conclude under existing law that the passengers would be unable to prove a set of facts entitling them to relief. *Id.* at 1375. Similarly, other recent maritime decisions have permitted a passenger's vicarious liability action for the alleged negligent acts of the ship's physician to withstand the ship owner's motion to dismiss. *See Doonan v. Carnival Corp.*, 404 F.Supp.2d 1367, 1371-72 & n. 2 (S.D.Fla.2005) (dismissing passenger's claim based upon actual agency where the passenger's allegations were insufficient to justify deviation from the majority rule, but declining to dismiss vicarious liability claim based upon apparent agency because "despite *Barbetta*, a Plaintiff may be able to sustain an apparent agency claim"); *Mack v. Royal Caribbean Cruises, Ltd.*, 361 Ill.App.3d 856, 297 Ill.Dec. 593, 838 N.E.2d 80, 91 (2005) (finding that federal maritime law is unsettled and affirming the denial of the ship owner's motion to dismiss in accord with the holdings of *Nietes*, *Huntley*, and *Fairley*), *appeal denied*, 218 Ill.2d 542, 303 Ill.Dec. 3, 850 N.E.2d 808 (Ill.2006), *and cert. denied*, __ U.S. __, 127 S.Ct. 350, 166 L.Ed.2d 44 (2006).

As earlier stated, we find merit in the plaintiff's argument and the reasoning of the district court. However, because this is a maritime case, this Court and the Florida district courts of appeal must adhere to the federal principles of harmony and uniformity when applying federal maritime law. At the time the instant case was decided by the Third District, with the exception of *Nietes*, the federal maritime law uniformly held that a ship owner is not vicariously liable for the medical negligence of the shipboard physician.

Appendix A

CONCLUSION

Based on the foregoing, we quash the decision of the district court and hold that the ship owner is not vicariously liable under the theory of respondeat superior for the medical negligence of the shipboard physician.

It is so ordered.

LEWIS, C.J., and WELLS, PARIENTE, and CANTERO, JJ., concur.

ANSTEAD and BELL, JJ., concur in result only.

APPENDIX B — OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT FILED AUGUST 27, 2003

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 2003

CASE NO. 3D01-1518

LOWER TRIBUNAL NO. 98-6109

DARCE CARLISLE,

Appellant,

vs.

CARNIVAL CORPORATION, et al.,

Appellees.

Opinion filed August 27, 2003.

Before COPE and RAMIREZ, JJ., and NESBITT, Senior Judge.

NESBITT, Senior Judge.

In March 1997, the Carlisle family embarked on a cruise aboard the Carnival cruise ship, the Ecstasy. During the

cruise, 14 year old Elizabeth Carlisle felt ill with abdominal pain, lower back pain and diarrhea and was seen several times in the ship's hospital by the ship's physician, Dr. Mauro Neri. Over the course of several days Dr. Neri repeatedly advised the Carlisles that Elizabeth was suffering from the flu, assured them in response to their questions that it was not appendicitis, and provided antibiotics. Ultimately, the Carlisle family decided to discontinue their cruise and returned home to Michigan where Elizabeth was diagnosed as having a ruptured appendix. Her appendix was removed, and as a result of the rupture and subsequent infection, Elizabeth was rendered sterile.

Her parents filed the instant suit against Carnival and Dr. Neri, alleging, *inter alia*, that the doctor had acted negligently in his treatment of Elizabeth and that Carnival should be held vicariously liable for such negligence under theories of agency and apparent agency, and that Carnival was negligent in the hiring of Dr. Neri. The trial court entered summary judgment in favor of Carnival and this appeal followed.

The contract between Dr. Neri (identified therein as "CONTRACTOR") and Carnival (identified therein as "PURCHASER"), provided, in part:

> CONTRACTOR agrees to provide services aboard vessel in the capacity of SHIP'S PHYSICIAN . . . Said services shall consist of the providing of medical services and treatment to passengers and crew in accordance with PURCHASER'S Physician guidelines and shall

> be performed on a seven (7) day-per-week basis during regular and on-call vessel infirmary hours and for emergencies.

The contract further provides that Dr. Neri would receive a weekly salary as his sole source of income during the term of the Agreement, and that Carnival could dismiss Dr. Neri for "violations of the Ship's Articles" or "failure to perform duties to the satisfaction of" Carnival. Dr. Neri was issued a ship's uniform and agreed his photograph, name and likeness could be used to promote and publicize Carnival's vessels in any and all media. The record shows that Dr. Neri was considered by Carnival to be an officer of the ship. In a separate agreement Carnival agreed to indemnify Dr. Neri for up to $1 million with regard to claims brought against him arising out of any act or omission on his part while acting in the course of his duties as ship's doctor, and Dr. Neri agreed that Carnival, or its insurer, would be permitted to take absolute control over the defense and handling of such claims.

The cruise ticket issued to the Carlisles provides, in part:

> If the vessel carries a physician, nurse, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the guest and any such person in dealing with the guest is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the carrier and the carrier shall not be liable for any act or omission of such person or those under his order or assisting him with respect to treatment, advice or care of any kind given to any guest.

Appendix B

Torts committed within maritime jurisdiction fall within the purview of maritime law. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); *Klosters Rederi A/S d/b/a Norwegian Caribbean Lines, v. Cowden*, 447 So.2d 1017 (Fla. 3d DCA 1984). *See also Rand v. Hatch*, 762 So.2d 1001 (Fla. 3d DCA 2000) (general maritime law applies to a claim for a ship's doctor's malpractice). Additionally, a cruise ship ticket is a maritime contract, governed by maritime law. *See The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427, 18 L.Ed. 397 (1866); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 (9th Cir.2002).

It is axiomatic under maritime law that a carrier owes a duty to its passengers to exercise reasonable care under the circumstances. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir.1988); *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So.2d 488 (Fla. 3d DCA 1986).

In arguing that this duty should not be a basis to impose vicarious liability upon a cruise line for the negligence of its ship's physician in treating passengers Carnival relies upon the long line of decisions exemplified by *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir.1988), which held:

> When a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the carrier has a duty to employ a doctor who is competent and duly qualified. If the carrier

breaches its duty, it is responsible for its own negligence. If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier. *E.g.*, *The Korea Maru*, 254 F. 397, 399 (9th Cir.1918); *The Great Northern*, 251 F. 826, 830-32 (9th Cir.1918); *Di Bonaventure v. Home Lines, Inc.*, 536 F.Supp. 100, 103-04 (E.D.Penn.1982); *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 A.M.C. 2674, 2677 (S.D.N.Y.1981); *Amdur v. Zim Israel Navigation Co.*, 310 F.Supp. 1033, 1042 (S.D.N.Y.1969); *Branch v. Compagnie Generale Transatlantique*, 11 F.Supp. 832 (S.D.N.Y.1935); *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D.Mass.1923); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y.1904); *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy*, 107 N.Y. 228, 13 N.E. 781 (1887).

See also Cummiskey v. Chandris, 895 F.2d 107 (2d Cir.1990); *Doe v. Celebrity Cruises*, 145 F.Supp.2d 1337 (S.D.Fla.2001); *Mascolo v. Costa Crociere*, 726 F.Supp. 1285 (S.D.Fla.1989). The stated basis for the *Barbetta* line of authority is the lack of the cruise line's ability to control the doctor-patient relationship and lack of expertise to control the doctor in his practice of medicine, in that "a ship is not a floating hospital." *Barbetta*, 848 F.2d at 1368-1371.

The Carlisles argue that the *Barbetta* cases are based upon flawed and outmoded assumptions regarding the cruise ship industry and the provision of medical services to

passengers, and urge that *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D.Cal.1959) is a better reasoned decision. In *Nietes*, the cruise line was held vicariously liable for the negligence of the ship's doctor who was a member of the crew:

> It is our opinion that, where a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable . . .
>
> While it has been stated that 'there is no more distinct calling than that of the doctor,' we are, nonetheless, persuaded to this conclusion by numerous cases which demonstrate the growing tendency to hold the doctor a servant in special circumstances, as where he is a resident physician on a hospital staff, or where he is a corporate employee performing medical services which accrue to the benefit of his employer
>
> The rule of the older cases rested largely upon the view that a non-professional employer could not be expected to exercise control or supervision over a professionally skilled physician. We appreciate the difficulty inherent in such an

employment situation, but we think that the distinction no longer provides a realistic basis for the determination of liability in our modern, highly organized industrial society. Surely, the board of directors of a modern steamship company has as little professional ability to supervise effectively the highly skilled operations involved in the navigation of a modern ocean carrier by its master as it has to supervise a physician's treatment of shipboard illness. Yet, the company is held liable for the negligent operation of the ship by the master. So, too, should it be liable for the negligent treatment of a passenger by a physician or nurse in the normal scope of their employment, as members of the ship's company, subject to the orders and commands of the master.

A carrier is under no duty to practice medicine . . . , But, when a carrier undertakes the treatment of illness through medical services, provided by it aboard ship, it assumes the duty to treat carefully.

There is reason for imposing such liability, because the employment of a doctor aboard ship is a beneficial substitute for the shipowner's otherwise more costly duty to sick passengers. Where the ship carries no ship's physicians or nurses, the carrier is under a duty to provide such care and attention as is reasonable and practicable under the circumstances, and this has traditionally required the master to change course and put in at

> the nearest port, according to the gravity of the illness. This duty extends to both passengers and seamen whose lives may be threatened by illness on board ship. Any dereliction of the master in his duty to detour may be negligence for which the shipowner could be liable under the principle of respondeat superior. The shipowner, by providing a physician aboard ship, avoids his sometimes inconvenient and costly duty to change course for the benefit of an ailing passenger. This arrangement gives the shipowner competitive advantage in the maritime passenger industry over those sea-going carriers which have not provided the safety of on-board medical service.

181 F.Supp. at 220-221 (citations omitted). *See also Fairley v. Royal Cruise Line, Ltd.*, 1993 AMC 1633 (S.D.Fla.1993) (criticizing *Barbetta* and supporting the rationale of *Nietes*, while recognizing the viability of an apparent agency theory of recovery).

This issue has never been squarely addressed by this court or the Florida Supreme Court, and we, like many of the commentators, find *Nietes* to be the most persuasive precedent. *See e.g.*, Norris, *The Law of Maritime Personal Injuries*, 4th Ed, § 3:10 ("In light of the modern trends with respect to tort liability, it is probable that the earlier cases holding that in passenger matters the shipowner's duty is fulfilled by employing a duly qualified and competent surgeon and medical practitioner and is only liable for negligence in hiring him but not for treatment by him, will not be followed," citing Judge Sweigert's "excellent opinion"

in *Nietes*.); Beth-Ann Erlic Herschaft, Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?, 17 *Nova L.Rev.* 575 (1992); Michael J. Compagno, Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star, 14 *Tul. Mar. L.J.* 381 (1990).

While *Barbetta* criticized *Nietes* as unrealistically presuming away the problem by assuming a ship's doctor was under sufficient control via modern communication with a company's chief surgeon, the *Barbetta* line of cases rests on even shakier fictions. *Barbetta's* finding that the cruise line should not be held responsible is premised on the unrealistic suggestion that an ailing cruise passenger at sea has some meaningful opportunity to simply forego treatment by the ship's doctor and demand that the captain fulfill his duty of care in some other fashion:

> Second, as the Barbettas' counsel acknowledged during oral argument, even though a ship's doctor is provided for the passenger's convenience, no passenger is required to use the doctor's services; consequently, as counsel also conceded, a carrier must honor a passenger's decision not to use the ship's doctor and, when necessary, discharge its duty to provide aid in some other way.

Barbetta, 848 F.2d at 1372. A cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor. The underlying basis in *Barbetta* and its progeny for the idea that the passenger has some choice in the matter, and that the cruise line lacks control because it cannot interfere in the doctor-patient

relationship, is the following statement regarding ill passengers from *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (Mass.1891):

> They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer . . .

154 Mass. at 276, 28 N.E. 266. Noticeably absent from this list is the option of demanding that the captain fulfill the duty of reasonable care "in some other way," likely because that concept was no more realistic in 1891 than it is today. *Barbetta*, it appears, employed this fiction to ameliorate the harshness of the rule it espoused.[1]

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1. *Barbetta* also misreads *Nietes* as assuming:

> [T]hat by hiring any doctor to sail with the vessel, the carrier discharges that duty ... Given that the *Nietes* court wrongly assumed that without respondeat superior liability, a carrier could escape legal responsibility simply by providing any doctor for its passengers, we reject that court's analysis of why vicarious liability is necessary.

Barbetta, 848 F.2d at 1372. *Nietes*, however, made no such assumption and, in fact, specifically recognized the duty to use due care in the hiring of a competent physician and the cause of action for a ship owner's breach of that duty. 188 F.Supp. at 221. Contrary to the implication of *Barbetta*, the duty to use due care in hiring does not obviate the duty to exercise reasonable care toward a passenger during a voyage.

Appendix B

The fallacy of the notion that the acutely ill passenger at sea has sifted through a series of options and ultimately chosen to use the ship's doctor underscores the fiction of the familiar incantation that the physician is on board merely for the "convenience of the passenger." In reality, as has been recognized, the ends of the cruise line are, at the very least, equally served by being able to fulfill its duty to ill or injured passengers without necessarily being required to disrupt the voyage or incur great expense to evacuate the patient every time a medical situation arises. *See Nietes*, 188 F.Supp. at 221; *Fairley*, 1993 AMC at 1639; Herschaft, *supra*, at 593; Compagno, *supra*, at 389-90. While the presence of an onboard physician is not required by law, the practical realities of the competitive cruise industry, and the reasonably anticipated risks of taking a small city of people to sea for days at a time, all but dictate a doctor's presence. There is also undoubtedly a benefit derived by the cruise line in being able both to market the availability of a doctor and to more cost effectively address its duty to its passengers.

Barbetta's conclusion that there is a "lack of control" over the doctor-patient relationship is based on the fiction that the passenger freely chose the doctor and on the concept that the doctor's work is not the business of the cruise line. 848 F.2d at 1368. The treatment of cruise passengers by the ship's doctor, however, is not alien to maritime pursuits. Indeed, in *Rand v. Hatch*, 762 So.2d 1001 (Fla. 3d DCA 2000), in concluding that general maritime law applies to a claim for a ship's doctor's malpractice, we held that such treatment "bears a significant relationship to traditional maritime activity," stating:

Appendix B

In *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 543, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995), the United States Supreme Court established that in considering whether a particular tort bears a significant relationship to traditional maritime activity to satisfy the nexus test, courts should consider whether the incident giving rise to the suit is likely to disrupt maritime activity and whether it is substantially related to traditional maritime activity to justify application of general maritime law. *See Sisson v. Ruby*, 497 U.S. 358, 365, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990)(discussing these considerations). *In this case, Dr. Rand and Nurse Jackson were brought onboard a commercial vessel which sailed on navigable waters by the shipowner in order to render medical attention to both crew members and passengers when such attention was needed. Sick and injured crew and passengers, either left untreated or inadequately treated, are certainly likely to disrupt maritime activity, such as the successful navigation of a commercial vessel.* (Emphasis added).[2]

Maritime law embraces the principles of agency. *See Cactus Pipe & Supply Co., Inc. V. M/V Montmartre*, 756 F.2d

2. In *Rand* we cited *Barbetta* for the proposition that general maritime law is applicable to a claim of medical malpractice in navigable waters and, in *dicta*, we noted the holding of *Barbetta*. We were not called upon there to address the underlying vicarious liability issue.

1103, 1111 (5th Cir.1985); *West India Industries, Inc. v. Vance & Sons AMC-Jeep*, 671 F.2d 1384, 1387 (5th Cir.1982). These principles include that there is no inherent conflict between a physician's contractual independent contractor status and a finding of agency where the totality of the circumstances warrant, *See Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842, 854 (Fla.2003); Restatement (Second) of Agency § 14N cmt. a (1958), and that a conclusory statement of independent contractor status in a contract document is not necessarily controlling. *Villazon*, 843 So.2d at 853. *See also Smith v. Commodore Cruise Line, Ltd.*, 124 F.Supp.2d 150, 157 (S.D.N.Y.2000)(ship's doctor was cruise line's agent, whose knowledge of personal injuries he treated is imputed to the cruise line).

The record indicates a certain amount of control over the doctor's medical services in that the cruise line provides the medical supplies, selects the nurses, sets the hours of operation of the infirmary, and provides a policy and procedures manual for the operation of the infirmary. When considering a claim based on agency, it is the right of control, not actual control, that may be determinative. *Villazon*, 843 So.2d at 853. Here, in addition to being an officer of the ship and subject to the ship's articles, Dr. Neri's duties were to provide "medical services and treatment to passengers and crew in accordance with PURCHASER'S Physician guidelines" and he was subject to dismissal for "failure to perform duties to the satisfaction of" Carnival.[3]

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3. The record does not reflect the contents of the "Purchaser's Physician guidelines" referred to, although Carnival's director of medical credentialing, Dr. Diskin, testified Carnival did not provide

(Cont'd)

More significantly, because it is foreseeable that some cruise passengers at sea will develop medical problems and the only realistic alternative for such an ill or injured passenger is treatment by the ship's doctor provided by the cruise line, there is an element of control over the doctor-patient relationship which *Barbetta* failed to recognize. We reject the holding of the *Barbetta* line of cases and hold that the cruise line's duty to exercise reasonable care under the circumstances extends to the actions of the ship's doctor placed on board by the cruise line. We accordingly hold that, regardless of the contractual status ascribed to the doctor, for purposes of fulfilling the cruise line's duty to exercise reasonable care, the ship's doctor is an agent of the cruise line whose negligence should be imputed to the cruise line.

In imposing such vicarious liability we note that, on any given cruise, the cruise line is already held vicariously liable for the negligence of the same ship's doctor in the treatment of hundreds of people—the crew—under the maritime duty to provide maintenance and cure. *See De Zon v. American President Lines*, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065,

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(Cont'd)

ship's doctors with a manual as to specific medical procedures. He testified the policy and procedures manual for the operation of the infirmary was not geared toward the doctor, but more to the nurses who "essentially run the infirmary on a day-to-day basis." He further testified that he had assisted ship's doctors in determining whether certain new medications were appropriate for the ship's infirmary, and that a practice existed whereby land based doctors or hospitals under contract with Carnival to treat Carnival's crew members would maintain a telephone "hot line" to consult with ships' physicians when needed.

318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943); *De Centro v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 140 (5th Cir.1986); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir.1971); *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir.1968). Thus, in the case of a seaman, a ship owner is liable for the negligence of the ship's doctor regardless of the degree to which the doctor's medical activities, or the doctor-patient relationship, can be controlled by the ship owner.

As for the exculpatory language contained in the passenger ticket, 46 App. U.S.C.A. § 183c invalidates certain purported disclaimers of liability:

> It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement *any provision or limitation* (1) *purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability*, or from liability beyond any stipulated amount, for such loss or injury ... All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be *against public policy and shall be null and void and of no effect.*

See Carlisle v. Ulysses Line, Ltd., 475 So.2d 248 (Fla. 3d DCA 1985) (exculpatory clause attempting to relieve cruise line from liability for negligence of its servants would be

unlawful under 46 U.S.C § 183c). *See also Fairley*, 1993 AMC at 1641, n. 7 (citing 46 App. U.S.C.A. § 183c for the proposition that cruise line's disclaimer of liability for physician's negligence did not, as a matter of law, preclude apparent authority claim). To the extent the cruise ticket seeks to limit Carnival's liability for the negligence of its agent, it is invalid.[4]

A cruise ship is a city afloat with hundreds of temporary citizens, some of whom are passengers and some of whom are the employees and agents of the cruise line who comprise the ship's crew, each of whom, within their particular sphere, owe a duty of reasonable care to the passengers. The cruise line's duty of reasonable care under the circumstances includes the duty of the ship's doctor to adhere to the standard of care of a reasonable ship's doctor under the circumstances.[5]

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4. Where a cruise passenger's medical negligence claim is limited to the ship's doctor individually, the passenger is effectively faced with having to engage in a game of personal jurisdiction and service of process roulette, with the ability to proceed against the doctor depending on various factors such as contacts with the state, whether medical treatment was provided in Florida waters or at sea, and the practical realities of effectuating service of process. See, e.g., *Rana v. Flynn*, 823 So.2d 302 (Fla. 3d DCA 2002)(personal jurisdiction present where treatment in Florida waters and there were multiple contacts with state); *Elmund v. Mottershead*, 750 So.2d 736 (Fla. 3d DCA 2000)(no personal jurisdiction over non-resident ship's doctor with insufficient Florida contacts); *Rossa v. Sills*, 493 So.2d 1137 (Fla. 4th DCA 1986)(sufficient contacts to support personal jurisdiction). Two years after this matter was filed the Carlisles had not been able to serve process on Dr. Neri.

5. As a result of our ruling it is unnecessary to address the (Cont'd)

Appendix B

On the basis of the foregoing we reverse the summary judgment on the issue of vicarious liability and remand this matter for further proceedings consistent herewith.

(Cont'd)
issues raised with regard to apparent agency. We find no error in that portion of the summary judgment on the claim of negligent hiring. *See Barbetta*, 848 F.2d at 1373-74.

APPENDIX C — SUMMARY FINAL JUDGMENT OF THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA FILED FEBRUARY 5, 2003

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 98-6109 CA 05

DARCE CARLISLE, ET AL.,

Appellant/Respondent,

v.

CARNIVAL CORP., ET AL.,

Appellee/Petitioner.

SUMMARY FINAL JUDGMENT

Pursuant to this Court's Order of May 20, 2001 granting Defendant's Motion for Summary Judgment, Summary Final Judgment is hereby entered against Plaintiffs DARCE CARLISLE, KRISTOPHER CARLISLE, individually and as parents of ELIZABETH CARLISLE, a minor child. Plaintiffs shall go hence without day.

DONE AND ORDERED this 05 day of February, 2003 in Miami-Dade County, Florida in Chambers.

s/ Jon I. Gordon
JON I. GORDON, CIRCUIT JUDGE

APPENDIX D — ORDER OF THE SUPREME COURT OF FLORIDA DENYING PETITION FOR REHEARING DATED MARCH 27, 2007

SUPREME COURT OF FLORIDA

TUESDAY, MARCH 27, 2007

CASE NO.: SC04-393
Lower Tribunal No.: 3D01-1518

CARNIVAL CORPORATION

Petitioner(s)

vs.

DARCE CARLISLE

Respondent(s)

Respondent's "Motion for Rehearing and/or Clarification" is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO, and BELL, JJ., concur.

A True Copy
Test:

s/ Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

(2)

No. 06-1704

FILED
AUG 15 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DARCE CARLISLE,

Petitioner,

v.

CARNIVAL CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Florida Supreme Court

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RESTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review the Florida Supreme Court's decision that Florida's Third District Court of Appeal had no authority to reject settled maritime law that shipowners are not vicariously liable for the negligence of shipboard doctors in treating passengers where the Florida Supreme Court's decision does not conflict with a decision of this Court, a federal court of appeals, or another state court of last resort, and the decision does not implicate an important, unsettled federal question.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Carnival Corporation states that it does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
RESTATEMENT OF THE QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	3
I. The Florida Supreme Court's Opinion Does Not Create a Conflict of Authority	4
A. The Florida Supreme Court's Decision That the Third District Had No Authority to Change Settled Federal Maritime Law Does Not Conflict With Any Other Decisions	5
B. The *Barbetta* Rule Is Settled Maritime Law	7
II. The Florida Supreme Court Did Not Decide an Important Issue of Federal Maritime Law	17
III. The Florida Supreme Court Reached the Right Decision, and the *Barbetta* Rule Is Correct	18
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Allan v. State S.S. Co., 30 N.E. 482 (N.Y. 1892) 9, 23

Amdur v. Zim Israel Navigation Co., 310 F. Supp. 1033 (S.D.N.Y. 1969) 9, 10, 11, 22

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 6, 17, 18

American Trucking Ass'ns, Inc. v. Larson, 683 F.2d 787 (3d Cir. 1982) 15

Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988) ..... *passim*

Barnett v. Carnival Corp., No. 06-22521-CIV, 2007 WL 1526658 (S.D. Fla. May 23, 2007) 8, 13

Barnett v. Carnival Corp., No. 06-22521-CIV, 2007 WL 1746900 (S.D. Fla. June 15, 2007) 8, 13

Benson v. Norwegian Cruise Line Ltd., 859 So. 2d 1213 (Fla. 3d DCA 2003) 24

Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991) 17

Bowns v. Royal Viking Lines, Inc., 1977 A.M.C. 2159 (S.D.N.Y. 1977) 9

Branch v. Compagnie Generale Transatlantique, 11 F. Supp. 832 (S.D.N.Y. 1935) 9

Bykowski v. Holland America Line-Westours, Inc., No. C04-318Z, 2005 WL 2135144 (W.D. Wash. Aug. 31, 2005) 8

Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212 (5th Cir. 1980) 15

TABLE OF AUTHORITIES – Continued

Page

Carlisle v. Carnival Corp., 864 So. 2d 1 (Fla. 3d DCA 2003) ..... *passim*

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Churchill v. United Fruit Co., 294 F. 400 (D. Mass. 1923) 9, 23

Cimini v. Italia Crociere Int'l S.P.A., 1981 A.M.C. 2674 (S.D.N.Y. 1981) 9

Cummiskey v. Chandris, S.A., 895 F.2d 107 (2d Cir. 1990) 8

DeRoche v. Commodore Cruise Line, Ltd., 46 Cal. Rptr. 2d 468 (Cal. Ct. App. 1994) 9, 10

De Zon v. American President Lines, 318 U.S. 660 (1943) 9, 24

Di Bonaventure v. Home Lines, Inc., 536 F. Supp. 100 (E.D. Penn. 1982) 9, 11, 22

Doe v. Celebrity Cruises, 145 F. Supp. 2d 1337 (S.D. Fla. 2001) 8, 13

Doonan v. Carnival Corp., 404 F. Supp. 2d 1367 (S.D. Fla. 2005) 8, 13

Fairley v. Royal Cruise Line Ltd., 1993 A.M.C. 1633 (S.D. Fla. 1993) ..... *passim*

Gillmor v. Caribbean Cruise Line, Ltd., 789 F. Supp. 488 (D.P.R. 1992) 8, 22

Hilliard v. Kloster Cruise, Ltd., 1991 A.M.C. 314 (E.D. Va. 1990) 9, 22

Huntley v. Carnival Corp., 307 F. Supp. 2d 1372 (S.D. Fla. 2004) 13, 14

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Carnival Cruise Lines, Inc., 203 F. Supp. 2d 1367 (S.D. Fla. 2002) 8, 13

Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy, 107 N.Y. 228, 13 N.E. 781 (1887) 9

Lee v. Regal Cruises, Ltd., 916 F. Supp. 300 (S.D.N.Y. 1996), *affirmed*, 116 F.3d 465 (2d Cir. 1997) 8

Ludena v. The Santa Luisa, 112 F. Supp. 401 (S.D.N.Y. 1953) 9

Mack v. Royal Caribbean Cruises, Ltd., 838 N.E.2d 80 (Ill. App. Ct. 2005), *appeal denied, Mack v. Royal Caribbean Cruises, Ltd.*, 850 N.E. 2d 808 (Ill. 2006), *cert. denied, Royal Caribbean Cruises, Ltd. v. Mack*, 127 S.Ct. 350 (2006) 14, 15

Madruga v. Superior Court, 346 U.S. 556 (1954) 6, 7, 18

Malmed v. Cunard Line Ltd., No. 91 Civ. 8164 (KMW), 1995 WL 505915 (S.D.N.Y. Aug. 23, 1995) 8, 10, 22

Mascolo v. Costa Crociere, S.p.A., 726 F. Supp. 1285 (S.D. Fla. 1989) 9, 13, 22

Metzger v. Italian Line, 1976 A.M.C. 453 (S.D.N.Y.), *affirmed*, 535 F.2d 1242 (2d Cir. 1975) 8

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 19

Nanz v. Costa Cruises, Inc., 1991 A.M.C. 48 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991) 9, 13, 22

Nietes v. American President Lines, Ltd., 188 F. Supp. 219 (N.D. Cal. 1959) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

O'Brien v. Cunard S.S. Co., 28 N.E. 266 (Mass. 1891) 9, 23

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 7, 17, 18

Pota v. Holtz, 852 So. 2d 379 (Fla. 3d DCA 2003) 24

Rader v. Johnston, 924 F. Supp. 1540 (D. Neb. 1996) 15

Rana v. Flynn, 823 So. 2d 302 (Fla. 3d DCA 2002) 24

Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924) 7, 17, 18

Rossa v. Sills, 493 So. 2d 1137 (Fla. 4th DCA 1986) 24

Royal Caribbean Cruises, Ltd. v. Mack, No. 05-1662, 2006 WL 1786665 (U.S. June 27, 2006) 16

Royal Caribbean Cruises, Ltd. v. Mack, 127 S.Ct. 350 (2006) 16

The Catharine, 58 U.S. 170 (1854), *overruled by United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975) 20, 21

The Great Northern, 251 F. 826 (9th Cir. 1918) 8, 10, 23

The Harrisburg, 119 U.S. 199 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) 19

The Korea Maru, 254 F. 397 (9th Cir. 1918) 8, 10

The Napolitan Prince, 134 F. 159 (E.D.N.Y. 1904) 9

United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975) 19

Walsh v. NCL (Bahamas) Ltd., 466 F. Supp. 2d 1271 (S.D. Fla. 2006) 8, 13

TABLE OF AUTHORITIES – Continued

Page

Warren v. Ajax Navigation Corp., No. 91-0230-CIV-RYSKAMP, 1995 WL 688421 (S.D. Fla. Feb. 3, 1995) 8, 13, 22

Wurtenberger v. Cunard Line Ltd., 370 F. Supp. 342 (S.D.N.Y. 1974) 24

RULES

Rule 10, Supreme Court Rules 2

Rule 10(b), Supreme Court Rules 2, 17

Rule 10(c), Supreme Court Rules 2, 17

OTHER AUTHORITIES

Beth-Ann Erlic Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 Nova L. Rev. 575 (1992) 15

Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 Tul. Mar. L.J. 381 (1990) 15

Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 Tul. Mar. L.J. 447 (2004) 15

Thomas A. Gionis, *Paradox on the High Seas: Evasive Standards of Medical Care – Duty Without Standards of Care; a Call for the International Regulation of Maritime Healthcare Aboard Ships*, 34 J. Marshall L. Rev. 751 (2001) 15

INTRODUCTION

In August 2003, Florida's Third District Court of Appeal reversed a summary judgment for our client, Carnival Corporation, and held that a shipowner is vicariously liable for the negligence of a shipboard doctor in treating passengers. In doing so, the Third District expressly rejected the established federal maritime rule that shipowners are not vicariously liable for the negligence of shipboard physicians, commonly called the *Barbetta* rule after the Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988), and adopted instead the reasoning of a solitary federal district court case, *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959). *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 7 (Fla. 3d DCA 2003). On Carnival's motion, the Third District certified to the Florida Supreme Court as a matter of great public importance the question of "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger." 864 So. 2d at 8.

In February 2007, the Florida Supreme Court answered the question in the negative, concluding that Florida's Third District Court of Appeal ("Third District") erred when it departed from clearly established and well-settled maritime law in imposing vicarious liability on Carnival. *Carnival Corp. v. Carlisle,* 953 So. 2d 461, 463, 470-71 (Fla. 2007).

The petitioner, Darce Carlisle ("Carlisle") has presented no "compelling reasons" for this Court to grant her petition for a writ of certiorari seeking review of the

Florida Supreme Court's opinion. *See* Sup. Ct. R. 10.[1] Specifically, Carlisle has failed to demonstrate that the Florida Supreme Court decided an important federal question that conflicts with a decision of this Court, another state court of last resort, or a United States court of appeals, or decided an important federal question that is unsettled by this Court. *See* Sup. Ct. R. 10(b), (c). Therefore, Carlisle's petition should be denied.

STATEMENT OF THE CASE

We refer the Court to the factual and procedural history set forth in the Florida Supreme Court's opinion, *Carnival Corp. v. Carlisle,* 953 So. 2d 461, 463 (Fla. 2007) (App. A).[2]

[1] Rule 10 of the United States Supreme Court Rules, "Considerations Governing Review of Certiorari," provides that a petition for writ of certiorari will be granted "only for compelling reasons." Sup. Ct. R. 10. Rule 10 "indicate[s] the character of the reasons" that this Court will consider in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between the decisions of two federal courts of appeals, a court of appeals and the highest court of a state, or two state courts of last resort. Additionally, the Court considers whether a state court or federal court of appeals has decided an important question of federal law that should be settled by this Court, or decided a federal question in a way that conflicts with applicable decisions of this Court. Sup. Ct. R. 10(b), (c).

[2] We refer to the decisions of the Florida Supreme Court and the Third District Court of Appeal in this case, which are appended to the petition for writ of certiorari, by decision page numbers and appendix page numbers. The petitioner, Darce Carlisle, brought this action on behalf of her minor daughter, Elizabeth, and we refer to Darce as "Carlisle." Carlisle's petition for writ of certiorari is "Petition."

REASONS FOR DENYING THE PETITION

To invoke this Court's certiorari jurisdiction, Carlisle claims that there is a "conflict" or "split of authority" between "federal and state courts applying general maritime law" on the question of whether a shipowner may be held vicariously liable for the negligence of a shipboard physician (Petition at 4, 7). In the alternative, she asserts that this case presents an important question of federal maritime law affecting "cruise line passengers nationwide" (Petition at 15). On the merits, Carlisle posits that the *Barbetta* rule is antiquated and should be "overrule[d]" by this Court (Petition at 8).

As we will show, however, this Court should deny Carlisle's petition because this case does not present a conflict of authority or an important question of federal law requiring this Court's resolution. First, the Florida Supreme Court's decision quashing the Third District's underlying opinion does not conflict with a decision of this Court, a federal court of appeals, or another state court of last resort. The Florida Supreme Court merely held, squarely in accord with precedent of this Court, that the Third District had no authority to deviate from settled federal maritime law and violate the long-standing principle of uniformity. Apart from answering the certified question in the negative, the Florida Supreme Court did not even address the substantive question of a shipowner's vicarious liability for the medical negligence of a shipboard physician. Thus, its decision cannot be said to "conflict" with any precedent of this Court or of any other court on this issue. And even if it could be said that the Florida Supreme Court touched on the merits by answering the certified question in the negative, the notion that there is

any conflict here is quickly belied by a brief analysis of the purportedly conflicting decisions.

In addition, the Florida Supreme Court did not "decide" an important issue of federal law that is unsettled by this Court. Again, the decision merely stands for the unremarkable proposition that a state court – like the Third District in this case – cannot depart from uniform federal maritime law.

Finally, the Florida Supreme Court reached the right decision below because the Third District had no authority to deviate from the settled *Barbetta* rule on the vicarious liability of shipowners for the negligence of shipboard physicians, and the *Barbetta* rule is correct.

For all of these reasons, the petition should be denied.

I. The Florida Supreme Court's Opinion Does Not Create a Conflict of Authority

As the primary basis for attempting to invoke this Court's certiorari jurisdiction, Carlisle asserts that the Florida Supreme Court's decision in this case "raises an issue of federal maritime law over which federal and state courts applying general maritime law are squarely divided" (Petition at 4). According to Carlisle, although a "majority of courts" have elected to follow the *Barbetta* rule, "[a] growing number of courts" have rejected *Barbetta*, and "[t]his Court is the only judicial body capable of resolving the split of authority on this issue." (Petition at

6, 7).[3] As we will show, however, Carlisle's conflict theory is pure sophistry.

A. The Florida Supreme Court's Decision That the Third District Had No Authority to Change Settled Federal Maritime Law Does Not Conflict With Any Other Decisions

The Florida Supreme Court's opinion does not conflict with any decision of this Court, a United States court of appeals, or another state court of last resort. Carlisle tells this Court that the decision implicates an important federal maritime question over which the courts are "squarely divided" – the issue of a shipowners' vicarious liability for the medical negligence of a shipboard doctor (Petition at 4). But, as the Florida Supreme Court astutely recognized, the issue before it was actually quite different than the one Carlisle proposes:

> This Court must determine whether the Third District Court of Appeal could follow the holding in *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959), or whether the Third District was bound to follow the other

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[3] Although Carlisle posits that there are "four different views" on this legal issue, there are only two possible "views" on this matter – the "majority of courts" following the *Barbetta* rule and the so-called "growing number of courts" rejecting it (Petition at 6). The third "view" Carlisle discusses – courts following *Barbetta* with "reservations" – certainly falls within the majority category. And the last "view" Carlisle describes – courts declining to overrule *Barbetta* but holding that a cruise line can be liable for a shipboard physician's negligence on another legal theory – likewise falls within the ambit of the majority of courts following *Barbetta*.

> precedent as outlined in *Barbetta v. S/S Bermuda Star,* 848 F.2d 1364 (5th Cir. 1988).
>
> . . .
>
> *The question thus becomes whether the Third District was bound to follow the rule of law on this issue as espoused by the majority of such cases.* In other words, the questions that must be answered are whether there is a uniform federal position on the issue and whether application of the *Nietes* rule would violate the rule of uniformity.

953 So. 2d at 464-65 (emphasis added) (App. A at 5a, 6a). Thus, the Florida Supreme Court acknowledged that, instead of directly ruling on the vicarious liability issue, it had to examine whether Florida's Third District was required to follow the settled maritime rule of *Barbetta* or had the authority to discard it.

After thoroughly analyzing the body of case law addressing this issue dating back to 1887, the Florida Supreme Court agreed with Carnival that, with the exception of *Nietes,* the federal maritime law has been uniform that a shipowner is not vicariously liable for the medical negligence of the shipboard physician. 953 So. 2d at 470 (App. A at 18a). And consistent with well-settled precedent of this Court, the Florida Supreme Court correctly held that a state court could not interfere with the uniformity of maritime law by changing a long-settled maritime rule. 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a). *See also American Dredging Co. v. Miller,* 510 U.S. 443, 447 (1994) (state court may "'adopt such remedies, and . . . attach to them such incidents, as it sees fit' *so long as it does not attempt to make changes in the 'substantive maritime law'*") (emphasis added), quoting *Madruga v.*

Superior Court, 346 U.S. 556, 561 (1954), quoting *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 124 (1924). *Accord Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222 (1986). Thus, because the Third District violated the prohibition against a state's changing substantive maritime law by rejecting the universally applied *Barbetta* rule in favor of the never-before-followed *Nietes,* the Florida Supreme Court quashed the Third District's decision. 953 So. 2d at 465, 470-71 (App. A at 7a-8a, 18a-19a).

Accordingly, contrary to Carlisle's claim of conflict, the Florida Supreme Court's decision does not involve "a question of federal maritime law over which courts are presently divided" (Petition at 2). Instead, it reaffirms principles of uniformity that have governed maritime law for more than a century. The decision does not even address the merits of the vicarious liability issue apart from stating in *dicta* that "[t]he position espoused by the Third District has some appeal." 953 So. 2d at 470 (App. A at 17a). Because the Florida Supreme Court never directly addressed the substantive issue of a shipowner's vicarious liability, its decision certainly does not create a conflict on this issue warranting certiorari review. The petition should be denied.

B. The *Barbetta* Rule Is Settled Maritime Law

Even if it could be said that the Florida Supreme Court touched on the substantive issue of a shipowner's vicarious liability by answering the certified question in the negative, there is no conflict of authority for this Court to resolve. For well over a century, the maritime law has been that a shipowner is not vicariously liable for the negligence of a ship's physician in treating passengers. "If

the doctor is negligent in treating a passenger ... that negligence will not be imputed to the carrier." *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988). It is beyond question that the rule articulated in *Barbetta* is settled maritime law. In at least thirty-two decisions over more than a hundred years, courts have adhered to it, including five from federal circuit courts of appeals, twenty-three from federal district courts, two from New York's highest court, one from Massachusetts' highest court, and one from a California intermediate appellate court. *See Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990); *Barbetta*, 848 F.2d at 1369; *Metzger v. Italian Line,* 1976 A.M.C. 453, 455 (S.D.N.Y.), *affirmed*, 535 F.2d 1242 (2d Cir. 1975); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 831-32 (9th Cir. 1918); *Barnett v. Carnival Corp.,* No. 06-22521-CIV, 2007 WL 1746900, at **3-4 (S.D. Fla. June 15, 2007); *Barnett v. Carnival Corp.,* No. 06-22521-CIV, 2007 WL 1526658, at **3-4 (S.D. Fla. May 23, 2007); *Walsh v. NCL (Bahamas) Ltd.,* 466 F. Supp. 2d 1271, 1273-74 (S.D. Fla. 2006); *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1370-71 (S.D. Fla. 2005); *Bykowski v. Holland America Line-Westours, Inc.,* No. C04-318Z, 2005 WL 2135144, at *2 (W.D. Wash. Aug. 31, 2005) (unpublished); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Lee v. Regal Cruises, Ltd.*, 916 F. Supp. 300, 303 n.3 (S.D.N.Y. 1996), *affirmed*, 116 F.3d 465 (2d Cir. 1997); *Malmed v. Cunard Line Ltd.*, No. 91 Civ. 8164 (KMW), 1995 WL 505915, at **1-3 (S.D.N.Y. Aug. 23, 1995) (unpublished); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1634-35, 1639 (S.D. Fla. 1993); *Gillmor v. Caribbean*

Cruise Line, Ltd., 789 F. Supp. 488, 491-92 (D.P.R. 1992); *Hilliard v. Kloster Cruise, Ltd.*, 1991 A.M.C. 314, 316-17 (E.D. Va. 1990); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Penn. 1982); *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 A.M.C. 2674, 2677 (S.D.N.Y. 1981); *Bowns v. Royal Viking Lines, Inc.*, 1977 A.M.C. 2159, 2162-63 (S.D.N.Y. 1977); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042-43 (S.D.N.Y. 1969); *Ludena v. The Santa Luisa*, 112 F. Supp. 401, 408 (S.D.N.Y. 1953); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832, 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F. 400, 401-02 (D. Mass. 1923); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *Allan v. State S.S. Co.*, 30 N.E. 482, 485 (N.Y. 1892); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy*, 107 N.Y. 228, 230, 13 N.E. 781 (1887); *DeRoche v. Commodore Cruise Line, Ltd.*, 46 Cal. Rptr. 2d 468, 472 (Cal. Ct. App. 1994).[4] These cases all adopt the principles espoused in *Barbetta* as the applicable law.

In 1959, a federal district court judge in California took exception to the rule, and, ignoring the will of his own

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[4] In *De Zon v. American President Lines*, 318 U.S. 660 (1943), this Court, holding that an employer was liable to *seamen* for negligence of a ship's physician, in a footnote observed that "[l]iability to a *passenger* injured by the negligence of a ship's doctor has been denied on this ground," *id.* at 666 n.2 (emphasis added), and discussed and quoted as "statements of judges of great learning" the early cases establishing the rule of non-liability. Though the court in *Nietes* said it thought this Court in *De Zon* did so "with implied criticism," *Nietes*, 188 F. Supp. at 220, we have carefully read *De Zon* and can find no such implication.

judicial superiors on the Ninth Circuit Court of Appeals,[5] and relying not on ship cases but on hospital and corporation cases, made his own rule:

> It is our opinion that, where a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable.

Nietes v. American President Lines, Ltd., 188 F. Supp. 219, 220 (N.D. Cal. 1959). Despite a lapse of 44 years, no court until Florida's Third District Court of Appeal in this case followed *Nietes* to hold a shipowner vicariously liable. As Judge Marcus vividly put it in *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993), "the overwhelming tide of case law on the question holds that a shipowner may not be held vicariously liable for the torts of the ship's doctor," and "[t]he lone beacon of dissent is *Nietes*. . . . " *Id.* at 1634, 1635. Apart from not being followed, *Nietes* has been criticized by several courts. *See DeRoche*, 46 Cal. Rptr. 2d at 472 ("*Nietes* . . . appears to stand alone . . . and has been criticized roundly for it"). *Accord Malmed*, 1995 WL 505915, at *1 n.2. In *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. at 1042, the court observed that the *Nietes* rationale, "while perhaps viable for the specific fact

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[5] *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 831-32 (9th Cir. 1918).

pattern in *Nietes*, is not sound as a general rule," *accord Di Bonaventure*, 536 F. Supp. at 103, and that "[t]o pretend, as the *Nietes* case does, that mere employment of a physician by a shipping company . . . creates control, is to create a species of liability without fault which is without precedent." *Amdur*, 310 F. Supp. at 1042-43. The *Barbetta* court found *Nietes* to be "internally contradictory" and misguided. 848 F.2d at 1370-71.

Again, the Third District here embraced the never-before-followed *Nietes* case that would hold shipowners liable for shipboard doctors' negligence, "reject[ed] the holding of the *Barbetta* line of cases," and "impos[ed] . . . vicarious liability" on Carnival. 864 So. 2d at 5, 7 (App. B at 27a, 33a). Although the district court acknowledged that it was required to apply maritime law, 864 So. 2d at 3 (App. B at 23a), it chose a lone case and general principles over a huge majority of contrary decisions and the rule precisely on point. On Carnival's motion, the Third District certified to the Florida Supreme Court the question "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger." 864 So. 2d at 8.

In February 2007, the Florida Supreme Court quashed the Third District's decision and answered the certified question in the negative, correctly recognizing that, at the time this case was decided by the Third District, "with the exception of *Nietes*, the federal maritime law uniformly held that a ship owner is not vicariously liable for the medical negligence of the shipboard

physician." 953 So. 2d at 470-71 (App. A at 18a-19a).[6] Applying well-established precedent from this Court that state courts must adhere to federal principles of uniformity when applying federal maritime law, the Florida Supreme Court held that the Third District was bound to follow the uniform maritime precedent articulated in *Barbetta* and was not free to deviate from it. 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a).[7]

Other than the now-reversed decision by the Third District here, the only other decisions following *Nietes* to impose vicarious liability on shipowners are two lower court decisions ignoring federal precedent. Before the Florida Supreme Court issued its opinion here, a senior judge of the United States District Court for the Southern District of Florida, relying on the Third District's erroneous decision on vicarious liability in this case, and also allowing that the cruise line could be liable under a theory

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[6] Carlisle had sought to hold Carnival liable on theories of, among other things, vicarious liability, negligent hiring and apparent agency. 864 So. 2d at 2 (App. B at 21a). As a result of its decision on vicarious liability, the Third District did not reach any issues of apparent agency, and it expressly found no error in that portion of the summary judgment on the claim of negligent hiring. 864 So. 2d at 8 n.5 (App. B at 35a-36a n.5). The Florida Supreme Court in this case did not address these alternative issues. Carlisle recently asked the Third District to adjudicate the apparent agency issue once this Court has ruled on her petition for writ of certiorari. After the Florida Supreme Court issued its mandate and remanded the case to the Third District on April 12, 2007, Carlisle successfully moved to stay the proceedings in the Third District pending this Court's review of the Florida Supreme Court's decision. Should this Court deny or grant review, Florida's Third District will revisit the issue of apparent agency on remand.

[7] Carlisle's assertion that "the Florida Supreme Court [in this case] *expressly* stated that it *agreed* with the reasoning of *Nietes*" is inaccurate and misleading (Petition at 5) (emphasis added).

of apparent agency, denied a motion to dismiss a complaint against Carnival for the alleged negligence of the shipboard doctor in treating a passenger. *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374-75 (S.D. Fla. 2004). In doing so, the district court judge ill-advisedly rejected the precedent of federal circuit courts and his *own court* to rely on a state court decision that completely departed from the established federal maritime law it was bound to follow. While it is true that the Eleventh Circuit has not addressed this issue, *id.* at 1374 n.5, that did not stop the Southern District in six earlier decisions and four later decisions, from adhering – as it knew it should in the interest of maintaining uniformity – to the *Barbetta* rule.[5] Moreover, to the extent *Huntley* was based on the Third District's erroneous decision in *Carlisle, Huntley* is also wrong, and its precedential value is negligible at best. *See also Doonan,* 404 F. Supp. 2d at 1371 (in dismissing with prejudice plaintiffs' claim of vicarious liability against Carnival for negligence of shipboard physician, declining to follow *Carlisle* or *Huntley* decisions, "which are non-binding authority").

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[5] *See Barnett v. Carnival Corp.*, No. 06-22521-CIV, 2007 WL 1746900, at **3-4 (S.D. Fla. June 15, 2007); *Barnett v. Carnival Corp.*, No. 06-22521-CIV, 2007 WL 1526658, at **3-4 (S.D. Fla. May 23, 2007); *Walsh v. NCL (Bahamas) Ltd.*, 466 F. Supp. 2d 1271, 1273-74 (S.D. Fla. 2006); *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1370-71 (S.D. Fla. 2005); *Jackson v. Carnival Cruise Lines, Inc.*, 203 F. Supp. 2d 1367, 1374 (S.D. Fla. 2002); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished); *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1634-35, 1639 (S.D. Fla. 1993); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49 (S.D. Fla. 1990), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989).

Also before the Florida Supreme Court's decision in *Carlisle*, an Illinois intermediate appellate court relied on *Nietes* in upholding the reinstatement of a vicarious liability claim against Royal Caribbean for the alleged negligence of a shipboard doctor. *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E. 2d 80 (Ill. App. Ct. 2005), *appeal denied, Mack v. Royal Caribbean Cruises, Ltd.*, 850 N.E. 2d 808 (Ill. 2006), *cert. denied, Royal Caribbean Cruises, Ltd. v. Mack*, 127 S.Ct. 350 (2006). In that case, fully acknowledging that its decision was a "depart[ure] from the established rule barring [such] vicarious liability claims," 838 N.E. 2d at 89, the state appellate court inconsistently and mistakenly assumed that because "*Nietes* and the federal cases that have followed its reasoning and holding" demonstrate that the issue of whether a shipowner may be held vicariously liable for the on-board doctor's medical negligence "is not settled at this time," it was free to follow *Nietes*. *Id.* The assumption was wrong because the "issue" *is* settled maritime law, and consequently the state court had no right to address this issue at all.

Additionally, the *Mack* court relied extensively on the flawed reasoning in the now-reversed *Carlisle* decision and the atypical decisions of *Nietes* and *Huntley*. 838 N.E. 2d at 89-91.[9] The intermediate appellate court also cited to the

[9] The Illinois state court also surprisingly cited to *Fairley v. Royal Cruise Line, Ltd.*, 1993 A.M.C. 1633 (S.D. Fla. 1993), in support of its decision. *Mack*, 838 N.E. 2d at 88, 91. Although the *Fairley* court expressed its displeasure with the reasoning of *Barbetta*, it actually held that the court was *bound by* the *Barbetta* rule on vicarious liability. 1993 A.M.C. at 1638-39. There the plaintiff had alleged apparent agency and joint venture theories arising out of the alleged malpractice of the ship's doctor, and the cruise line moved to dismiss. The district court, acknowledging that "the majority rule precludes

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criticism of the *Barbetta* rule by some legal scholars.[10] While a few scholars have sung *Nietes'* praises and criticized the *Barbetta* rule, courts are bound by controlling decisions notwithstanding scholarly criticism. *American Trucking Ass'ns, Inc. v. Larson*, 683 F.2d 787, 790 (3d Cir. 1982) ("we are not free to exercise the same license as scholars in disregarding still binding precedent"); *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212, 215 (5th Cir. 1980) ("[t]he Appellant . . . cites us to many scholarly criticisms . . . , but we are bound by the former decisions of this court"); *Rader v. Johnston*, 924 F. Supp. 1540, 1549 n.19 (D. Neb. 1996) ("[a]lthough the majority opinion in *Smith* has been harshly criticized by virtually every legal scholar and commentator addressing the decision . . . there is no question that the *Smith* decision is valid, binding precedent at this time").

Most tellingly, last term, this Court declined to review the Illinois state appellate court's decision in *Mack* where

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suing the shipowner based on the theory of respondeat superior," *Fairley*, 1993 A.M.C. at 1639, denied the motion to dismiss because it was unable to say that "there [was] no conceivable set of facts under which the Plaintiff could prevail on . . . for example, an agency-by-estoppel theory." *Id.* The *Fairley* court knew it must follow the *Barbetta* rule, and simply held that the plaintiff *might* be able to pursue another avenue to recovery.

[10] *Mack*, 838 N.E. 2d at 88-89, citing Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 Tul. Mar. L.J. 447 (2004); Beth-Ann Erlic Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 Nova L. Rev. 575 (1992); Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 Tul. Mar. L.J. 381 (1990); Thomas A. Gionis, *Paradox on the High Seas: Evasive Standards of Medical Care - Duty Without Standards of Care; a Call for the International Regulation of Maritime Healthcare Aboard Ships*, 34 J. Marshall L. Rev. 751 (2001).

the petitioner raised nearly the identical theory of conflict urged by Carlisle in this case. *Royal Caribbean Cruises, Ltd. v. Mack,* 127 S.Ct. 350 (2006). In the petition for writ of certiorari filed in this Court, Royal Caribbean argued that the state court's decision to impose vicarious liability on the cruise line for the negligence of the shipboard physician conflicted with precedent from this Court and "a century's worth of decisions of federal circuit courts of appeal." *Royal Caribbean Cruises, Ltd. v. Mack,* No. 05-1662, 2006 WL 1786665, at *6 (U.S. June 27, 2006) (Petition for Writ of Certiorari). Notwithstanding this claim of "conflict" (albeit by the defendant in that case and in a different legal posture than here), this Court denied certiorari review. *Royal Caribbean Cruises*, 127 S.Ct. 350. And apart from the Florida Supreme Court's recent decision to quash the Third District's aberrant *Carlisle* opinion, no significant legal developments have occurred after this Court denied the petition for writ of certiorari in *Mack* that would warrant a different decision here. There was no conflict then, and there is no conflict now. Accordingly, this Court should similarly decline to review the Florida Supreme Court's decision in this case.

In any event, three lower-court cases do not a "split of authority" make. Here at least thirty-two decisions, including five federal circuit court decisions, have adhered to the *Barbetta* rule, and only two federal district court decisions and a single intermediate state appellate court have rejected it in approximately one hundred and twenty years.

> For there to be a "split of authority," . . . the rule urged . . . must have been pronounced either by the highest court of a state or by a federal circuit court. Neither state intermediate courts of appeals cases nor federal district court cases are

> sufficiently authoritative to constitute a "split of authority" unless there are so many of them from one jurisdiction over such a long period that it can be reasonably inferred that the highest court of the state or the federal court of appeals acquiesces in the rule.

Blankenship v. General Motors Corp., 406 S.E.2d 781, 786 n.9 (W. Va. 1991).

Because Carlisle has failed to establish that the Florida Supreme Court's decision in this case conflicts with any decision of this Court or another court of appeals, the Court should deny the petition.

II. The Florida Supreme Court Did Not Decide an Important Issue of Federal Maritime Law

For the same reasons that it cannot be said that a conflict exists between the decision of the Florida Supreme Court here and any other appellate decision, it cannot be said that the Florida Supreme Court in this case "decided" an important question of federal maritime law. Sup. Ct. R. 10(b), (c). The Florida Supreme Court did not address the merits on the question of a shipowner's vicarious liability; instead, it merely decided – squarely in accord with precedent of this Court[11] – that the Third District had no authority to depart from uniform maritime precedent by changing a firmly established maritime rule. Thus, it could hardly be said that this decision implicates an

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[11] *See, e.g., American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986); *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

important issue of federal law that is unsettled by this Court.

And, as the cases cited in point I.B make clear, the federal and state appellate and district courts have – for more than a century – adhered to the settled maritime rule of *Barbetta*. Thus, even if it could be said that the Florida Supreme Court inferentially reached the substantive issue by answering the certified question in the negative, the decision to apply firmly entrenched maritime jurisprudence that a shipowner is not vicariously liable for the negligence of the shipboard doctor in treating passengers was made many years ago – in other cases.

III. The Florida Supreme Court Reached the Right Decision, and the *Barbetta* Rule Is Correct

Finally, the Florida Supreme Court reached the right decision below because the Third District had no right to deviate from the settled *Barbetta* rule on the vicarious liability of a shipowner for the shipboard doctor's negligence, and the *Barbetta* rule is correct.

As we have said, the Florida Supreme Court, consistent with well-settled precedent of this Court, correctly held that the Third District could not interfere with the uniformity of maritime law by altering a well-settled maritime rule. *Carlisle,* 953 So. 2d at 465, 470 (App. A at 7a-8a, 18a). *See also American Dredging,* 510 U.S. at 447 (state court may "'adopt such remedies, and . . . attach to them such incidents, as it sees fit' *so long as it does not attempt to make changes in the 'substantive maritime law'*") (emphasis added), quoting *Madruga,* 346 U.S. at 561, quoting *Red Cross Line,* 264 U.S. at 124. *Accord Offshore Logistics,* 477 U.S. at 222. Consequently, because

the Third District violated the prohibition against a state's changing substantive maritime law by rejecting the established *Barbetta* rule in favor of the never-before-followed *Nietes*, the Florida Supreme Court quashed the Third District's decision. 953 So. 2d at 465, 470-71 (App. A at 7a-8a, 18a-19a). The Florida Supreme Court's decision is entirely correct.

In addition, Carlisle's argument that this Court should overrule the *Barbetta* rule because it has "outlived its usefulness" is entirely unconvincing (Petition at 8, 15). Carlisle points to this Court's decisions in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), as support for her theory that this Court can overrule maritime precedent where it is outdated (Petition at 8-10). But neither of those decisions is helpful to Carlisle because the Court's rationales for changing maritime jurisprudence in those cases have no application here.

In *Moragne*, this Court overruled *The Harrisburg*, 119 U.S. 199 (1886), which had held that general maritime law offered no wrongful death remedy for tortious deaths occurring on state territorial waters. 398 U.S. at 375-76, 401, 409. For almost a century pre-dating *Moragne*, there was an adequate federal remedy for fatal accidents on the high seas, but the same accidents nearer shore might yield more generous awards – or none at all – depending on the law of the nearest state. These resulting anomalies in wrongful death recoveries prompted this Court to establish a maritime wrongful death action consistent with the "constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Moragne*, 398 U.S. at 401-02 (citations and internal quotation marks

omitted). Consequently, this Court held that an action existed for wrongful death in territorial waters "caused by [the] violation of maritime duties." 398 U.S. at 409. By aligning the general maritime law with the policies embodied in the Death on the High Seas Act and the Jones Act and state statutory schemes, this Court furthered the twin aims of maritime law, uniformity and special solicitude – "[o]ur recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." 398 U.S. at 401.

Similarly, in *Reliable Transfer,* the Court overruled the unquestionably archaic divided-damages rule, set forth in *The Catharine,* 58 U.S. 170 (1854), under which damages were divided equally among concurrent maritime tortfeasors without any attempt to determine the parties' proportional fault. 421 U.S. at 397-98, 410-11. Stating that this rule "has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit," this Court noted that the rule had been "repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court [has] sought to achieve . . . – the 'just and equitable' allocation of damages." 421 U.S. at 410-11. Recognizing that this goal could be more nearly realized by a standard that allocated liability for damages according to comparative fault whenever possible, this Court established the rule of proportional fault for admiralty collision cases. 421 U.S. at 411.

Thus, this Court has modified established maritime precedent where it served to promote the aims of maritime

law. This Court in *Moragne* created a wrongful death remedy under general maritime law in an effort to achieve uniformity in maritime law and correct the then-existing anomalies in wrongful death maritime recovery schemes, while in *Reliable Transfer,* it sought to modify an undeniably outdated and inequitable rule that had been repeatedly critiqued by federal judges. Here, by contrast, the *Barbetta* rule is fully consistent with maintaining the uniformity of maritime jurisprudence and has been routinely commended and followed by federal judges for over a century. Unlike in *Moragne* and *Reliable Transfer,* there is no compelling need to alter this well-settled maritime rule.

Carlisle further claims that *Barbetta* is "based on flawed and outmoded assumptions regarding the modern day cruise ship industry and the provision of shipboard medical services to passengers" (Petition at 8), specifically that "passengers are free to contract with the ship's doctor for any medical services they may require" (Petition at 11) and that "the ship's physician is provided for the convenience of the ship's passengers" (Petition at 12). But a closer look at *Barbetta* and other cases following the rule shows that although they may recite or quote the "convenience of the ship's passengers" and "free[dom] to contract" language, they are, except for a few very early cases, grounded on the issue of the shipowners' ultimate *control* over the doctor and the doctor-patient relationship. This is the primary and most prominent rationale for adherence to the rule. *See Barbetta*, 848 F.2d at 1369 (two justifications for the rule, both relating to control: (1) "the nature of the relationship between the passenger and the physician, and the carrier's lack of control over that relationship," and (2) a shipping company's lack of "expertise requisite to supervise a physician

or surgeon carried on board a ship") (citations and internal quotation marks omitted); *Malmed v. Cunard Line Ltd.*, No. 91 Civ. 8164 (KMW), 1995 WL 505915, at *2 (S.D.N.Y. Aug. 23, 1995) (unpublished) ("[c]ourts have . . . concluded that although a carrier may control certain aspects of a physician's employment – such as hours, wages, and working conditions – *the carrier does not control precisely that aspect of the physician's performance at issue in a malpractice or negligence action, that is, his or her practice of medicine*") (emphasis added); *Warren v. Ajax Navigation Corp.*, No. 91-0230-CIV-RYSKAMP, 1995 WL 688421, at *3 (S.D. Fla. Feb. 3, 1995) (unpublished) ("[n]umerous courts have found that the carrier or shipowner lacks both (1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients and (2) the power, even if it had the knowledge, to intrude into the physician-patient relationship"); *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 491 (D.P.R. 1992) (quoting *Barbetta* expertise and control language); *Hilliard v. Kloster Cruise, Ltd.*, 1991 A.M.C. 314, 317 (E.D. Va. 1990) (citing *Barbetta* justifications – lack of control and expertise); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 49-50 (S.D. Fla. 1990) ("each court addressing the issue . . . ha[s] focused on two issues: the element of control existing such that the master/servant doctrine does or does not apply; and the relationship between the passenger and the medical personnel and the level of control, if any, the shipowner/operator has over that relationship"), *affirmed*, 932 F.2d 977 (11th Cir. 1991); *Mascolo v. Costa Crociere, S.p.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989) (citing *Barbetta* justifications – lack of control and expertise); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Pa. 1982) (ship's doctor is an independent medical expert; "[w]here . . . control is lacking, there can be no vicarious liability"); *Amdur v. Zim Israel*

Navigation Co., 310 F. Supp. 1033, 1042-43 (S.D.N.Y. 1969) (shipping company does not possess expertise requisite to supervise physician and does not occupy a position of control over a ship's physician).[12,13]

Judge Marcus, in *Fairley*, recognized the control justification for the rule:

> The harshness of the [*Barbetta*] rule can only be justified by the notion that *meaningful* control is a prerequisite to vicarious liability and that – under any conceivable set of facts, and *even if he is a regular crewmember* – the carrier has no meaningful ability to control the ship's doctor.

1993 A.M.C. at 1637 (emphasis added).

Whether or not one agrees that a cruise ship's doctor is there for the convenience of passengers, or that passengers are free to decline the services of a ship's doctor, the fact remains – and this is key, because it is the basis of vicarious liability – that a shipowner has neither the control over the doctor-patient relationship nor the expertise to be held vicariously liable for a shipboard doctor's negligence in treating passengers. It is the courts' recognition of this

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[12] The cases we have not listed here follow the rule without discussing rationale.

[13] Of the four early cases discussing passengers' freedom to consult the doctor or not, only *Churchill v. United Fruit Co.*, 294 F. 400, 401-02 (D. Mass. 1923), did not also rely on some aspect of control. *See O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891) ("[t]he master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger"); *The Great Northern*, 251 F. 826, 831 (9th Cir. 1918) (same); *Allan v. State S.S. Co.*, 30 N.E. 482, 484-85 (N.Y. 1892) (no officer of the ship is competent to supervise the physician in his treatment of passengers; the responsible person is the physician, independent of all superior authority).

principle that has sustained the *Barbetta* rule all these years.

Finally, Carlisle argues that "[t]o the extent that cruise lines benefit economically from providing medical services to passengers, there is no reason why they should not be required to assume responsibility. . . ." (Petition at 14). But shipowners *do* assume responsibility. They cannot hire just *any* doctors, they must hire competent, duly qualified doctors, or they *will* be liable. "If the carrier breaches [this] duty, it is responsible for its own negligence." *Barbetta*, 848 F.2d at 1369.[14,15]

Because a shipowner cannot have the requisite control over a shipboard doctor to impose vicarious liability, the *Barbetta* rule is correct and should remain intact.

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[14] Here, the trial court also entered summary judgment for Carnival on Carlisle's claim of negligent hiring, and the Third District court affirmed that ruling. *Carlisle*, 864 So. 2d at 8 n.5 (App. B at 36a n.5).

[15] Carlisle also says that because Carnival is liable to crew members it should be liable to passengers (Petition at 14). But control is not a factor in liability to crew members, which has historically been based on the special nature of the relationship between a shipowner and crew members and which is guaranteed regardless of fault. *See Barbetta*, 848 F.2d at 1369 n.1, *quoting De Zon v. American President Lines*, 318 U.S. 660, 667 (1943). This comparison, therefore, cannot provide justification for imposing vicarious liability in the case of passengers. And although Carlisle suggests that a plaintiff has no remedy against a ship's doctor (Petition at 15), courts have found personal jurisdiction against ships' physicians in similar cases. *See Benson v. Norwegian Cruise Line Ltd.*, 859 So. 2d 1213, 1215 (Fla. 3d DCA 2003); *Rana v. Flynn*, 823 So. 2d 302, 303 (Fla. 3d DCA 2002); *Rossa v. Sills*, 493 So. 2d 1137, 1138 (Fla. 4th DCA 1986); *Wurtenberger v. Cunard Line Ltd.*, 370 F. Supp. 342, 344-45 (S.D.N.Y. 1974). *See also Pota v. Holtz*, 852 So. 2d 379, 381-82 (Fla. 3d DCA 2003).

CONCLUSION

Carlisle has not established any compelling reasons for this Court to grant the petition for writ of certiorari. Therefore, Carnival respectfully requests that this Court deny the petition.

Respectfully submitted,

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